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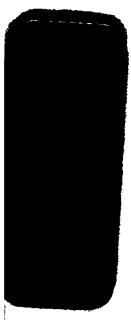

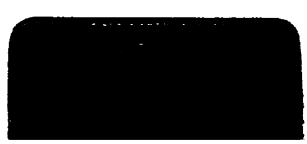

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THE FEDERAL TRADE COMMISSION

ITS NATURE AND POWERS

AN INTERPRETATION OF THE
TRADE LAW AND RELATED STATUTES

BY

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FOREWORD

The following pages present an interpretation of the Trade Law, and related statutes, the meaning and operation of which are somewhat vague and obscure in certain particulars, and have not yet been fully declared by the courts. If this interpretation shall assist the bar in reaching a conclusion as to what business conduct is prohibited by the statutes considered, and as to how those statutes should properly operate, we shall accomplish all we hope.

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Chicago, Illinois,

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THE FEDERAL TRADE COMMISSION

CHAPTER I.

NATURE OF THE COMMISSION.

§ 1. **Organization of Commission:** The Federal Trade Commission[1] consists of five Commissioners, appointed by the President, by and with the advice and consent of the Senate. The first Commissioners[2] appointed are to continue in office for three, four, five, six, and seven years respectively, from and after the taking effect of the Trade Law on September 26, 1914, but their successors are to be appointed for terms of seven years, except that a person appointed to fill a vacancy is to be appointed only for the unexpired term of the Commissioner whom he succeeds. The salary of a Commissioner is $10,000 a year. None of the Commissioners may engage in any other business, vocation, or employment, and not more than three of the Commission-

[1]Created by the Trade Law, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes" (H. R. 15613; Pub. No. 203; 63d Congress) in force September 26, 1914. Printed in full in appendix. For organization of Commission, see Trade Law, Secs. 1-3.

[2]The first Commissioners appointed were Joseph E. Davies, Edward N. Hurley, William J. Harris, Will H. Parry, who are to serve, respectively, for seven, six, five and four years from September 26, 1914, and George Rublee (a recess appointee), who is to serve at all events during the pleasure of the President, and until the end of the session of the Senate next after March 6, 1915, and thereafter, if confirmed, until September 26, 1917.

ers may be members of the same political party. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office, and in case of a vacancy in the Commission, the remaining Commissioners may exercise all of the Commission's powers.[3] The principal office of the Commission is at Washington, D. C.,[4] but it may meet and exercise all of its powers at any other place, and may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

The Commission has a chairman chosen by it from its own membership, and a secretary appointed by it.[5] It has an official seal, of which courts are required to take judicial notice. It may employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties, and as may be appropriated for by Congress. Other departments and bureaus of the government are required to detail to the Commission from time to time such of their officials and employees as the President may direct. Upon the organization of the Commission, and the election of its chairman, all the clerks, employees, records, papers, and property of the Bureau of Corporations were transferred to the Commission, and the Bureau of Corporations, and the offices of Commissioner and Deputy

[3]Three Commissioners constitute a quorum. See Rules of Practice, No. I, in appendix.

[4]All communications to the Commission shall be addressed to Federal Trade Commission, Washington, D. C., unless otherwise specifically directed. See Rules of Practice, No. XI, in appendix. As to sessions of the Commission, see Rules of Practice, No. I, in appendix.

[5]Commissioner Joseph E. Davies is Chairman. At the time of his appointment to the Trade Commission he was Commissioner of Corporations. See Sec. 2, *infra*. Leonidas L. Bracken is Secretary.

Commissioner of Corporations, automatically ceased to exist.

§ 2. **Derivation of Commission:** The Trade Commission is an outgrowth of the office of Commissioner of Corporations abolished by the Trade Law,[6] and is plainly modeled upon the lines of the Interstate Commerce Commission. The principal function[7] of the office of Commissioner of Corporations, created in 1903, was to acquire, and to report to the President, information as to the organization, conduct and management of the business of corporations engaged in interstate commerce, to the end that the President might thereby be enabled to make recommendations to Congress for legislation regulating such commerce. It is one of the several functions of the Trade Commission to furnish information as a basis for the enactment of additional legislation regulating interstate and foreign commerce.[8] But the Trade Commission may report to Congress directly, and is not under the domination of the President. The Commissioner of Corporations made his investigations under the direction and control of a member of the cabinet, the Secretary of Commerce and Labor. The Trade Commission is more independent and may act upon its own initiative and at its own discretion to a large degree.[9] The office of Commissioner of Corporations was a political office, and the incumbent changed with the administration. The Trade Commission is non-political and its membership will change infrequently.[10] The legislative purpose appears to have been that the Trade Commission should accumulate experience, form-

[6]Trade Law, Sec. 3.

[7]1 U. S. Comp. Stat. (1913) Tit. 12A, Ch. C, Sec. 889, p. 357; *United States* v. *Armour & Co.* (1906) 142 Fed. 808, 819.

[8]Secs. 5, (5), (6), and 38 and 39, *infra;* Trade Law, Sec. 6, (f), (h).

[9]Sec. 35, *infra.*

[10]Sec. 1, *supra.*

ulate precedents, maintain continuity and consistency of governmental policy towards business, and gradually bring about an evolutionary growth of regulation of industrial corporations engaged in interstate commerce similar to that which has resulted in respect of carrying corporations from the creation of the Interstate Commerce Commission.

§ 3. **Powers of Commission:** The general nature of the Trade Commission appears from the nature and scope of the powers which are conferred upon it by the Trade Law, and in part by the Clayton Law,[11] and are of course confined to the field of interstate and foreign commerce.[12] Its powers may be grouped as (1) regulative (2) advisory and (3) investigative.

§ 4. **Regulative power:**[13] The Commission has authority to institute and conduct against persons,[14] partnerships and corporations[15] engaged in interstate commerce, except banks and interstate common carriers, a statutory proceeding[16] designed to lead to a decree by a competent court, (1) restraining the use of "unfair methods of competition in commerce" which are declared unlawful by the Trade Law,[17] and (2) pre-

[11]The Clayton Law is entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (H. R. 15657; Pub. No. 212; 63d Congress), in force October 15, 1914. Printed in full in appendix. For the provisions of the Clayton Law which confer power upon the Trade Commission, see Secs. 2, 3, 7, 8 and 11 thereof.

[12]"Commerce", as used in the Trade Law, is defined in Sec. 4 thereof, and as used in the Clayton Law, in Sec. 1 thereof. The two definitions are different.

[13]See Chapter II, *infra*.

[14]For meaning of "persons", as used in the Clayton Law, see Sec. 1 thereof.

[15]For meaning of "corporation" as used in the Trade Law, see Sec. 4 thereof.

[16]Trade Law, Sec. 5; Clayton Law, Sec. 11; Secs. 29 to 33, *infra*.

[17]As to what are "unfair methods of competition", see Secs. 14 to 27, *infra*.

venting violations of sections two, three, seven and eight of the Clayton Law.[18] Those sections of the Clayton Law forbid (a) price discriminations between purchasers of commodities, where such discrimination may substantially lessen competition or tend to create a monopoly in any line of commerce; (b) exclusive purchase and sale arrangements, consisting of sales or leases of commodities, or the fixing of prices of commodities, whether patented or unpatented, upon condition that the purchaser or lessee shall not use or deal in the goods of a competitor, where such transaction may substantially lessen competition or tend to create a monopoly in any line of commerce; (c) intercorporate shareholding, and holding companies, where one corporation's owning or voting shares of stock of another may substantially lessen competition between the corporations affected, or restrain commerce in any section or community, or tend to create a monopoly of any line of commerce; (d) any person, after October 15, 1916, to be a director, officer, or employee of more than one federal bank, if either of such banks has capital, surplus, and undivided profits of more than $5,000,000; (e) any private banker, or person who is a director of any state bank or trust company having deposits, capital, surplus, and undivided profits of more than $5,000,000 to be a director of any federal bank, after October 15, 1916; (f) any federal bank, after October 15, 1916, in a city of more than 200,000 inhabitants, to have as a director, or other officer or employee, any private banker, or any director, officer, or employee of any other bank located at the same place, with certain exceptions; and (g) any person, after October 15, 1916, to be at the same time a director in any two or more corporations, except banks

[18]See Secs. 9 to 12, *infra*.

nish information to the legislative and executive branches of the government in furtherance of the enactment of new and the enforcement of existing laws, in part to inform and mould public opinion, in part to regulate trade, and in part to assist the courts. The Commission is not a court, and does not possess judicial power.[22] Its investigative power is perhaps the most formidable of any it possesses. Its regulative power is not great. The subjects intended principally to be affected by the Commission's powers would seem to be the antitrust laws, unfair competitive practices, and foreign trade. While under its regulative authority the Commission may institute and conduct proceedings against natural persons, its powers in the main pertain to corporations and, with exceptions which will be noted,[23] cannot affect banks subject to the jurisdiction of the Federal Reserve Board, or common carriers subject to the jurisdiction of the Interstate Commerce Commission.

[22]Sec. 30, *infra*.

[23]Secs. 11, 12, 35, 36, 45, *infra*.

CHAPTER II.

REGULATIVE POWER.

§ 8. **Scope of power:** The matters as to which the regulative power of the Commission may be exercised are discriminations in price between different purchasers of commodities, exclusive purchase and sale arrangements, intercorporate shareholding, and interlocking directorates, declared unlawful by the Clayton Law,[24] and unfair methods of competition in commerce, declared unlawful by the Trade Law.[25] As to those matters, the Commission's authority is preventive only. It can only restrain, and cannot even restrain effectively except in so far as its preventive orders may be sanctioned and enforced by the courts.[26] The Commission cannot punish violations of the law. It is without power to command affirmatively, or even to give protective permission for, the adoption of any course of conduct in interstate trade. The Trade Law is explicit that nothing therein contained shall be construed to prevent or interfere with the enforcement of the antitrust laws, or the acts to regulate commerce,[27] and that neither the restraining order of the Commission, nor the decree of a court in enforcement of such order, shall in any manner absolve or relieve any person or corporation from liability under the antitrust laws.[28]

[24]Clayton Law, Secs. 2, 3, 7 and 8; Sec. 4 *supra*, Secs. 9 to 12, *infra*.

[25]Trade Law, Sec. 5; Secs. 14 to 27, *infra*.

[26]Sec. 29 (6), (7), *infra*.

[27]Trade Law, Sec. 11.

[28]Trade Law, Sec. 5; Clayton Law, Sec. 11.

The Commission may institute and conduct restraining proceedings under its regulative power against natural persons as well as against all corporations engaged in interstate or foreign commerce, except banks subject to the authority of the Federal Reserve Board and common carriers subject to the authority of the Interstate Commerce Commission.

Although the question is not by any means free from doubt, perhaps it might not have been an unconstitutional delegation of power for Congress, had it seen fit, to confer upon the Commission power authoritatively to inform a person engaged in interstate trade, in advance of action by such person, whether any given proposed course of conduct in interstate trade, if pursued, would so restrain trade by lessening competition, or so tend to create monopoly, or constitute such an unfair method of competition, as to offend against the Trade Law, the Clayton Law, and the other antitrust laws.[29] And, since Congress failed to confer that power, it has been widely suggested[30] that, with the co-operation or acquiescence of the Attorney General, the Commission can, and should, assume it, by permitting any proposed commercial plan to be submitted informally for consideration in advance of being acted upon by the proponent, and then expressing and publishing an extra-legal opinion as to whether or not such plan is repugnant to law.

It is probably not to be anticipated that the Commission will assume ungranted power in the manner sug-

[29] *Mutual Film Corp.* v. *Ohio Ind. Comm.* (1915) 236 U. S. 230, 245-246; *Buttfield* v. *Stranahan* (1904) 192 U. S. 470, 496; *Union Bridge Co.* v. *United States* (1907) 204 U. S. 364, 378-386; *Coopersville Co-operative Creamery Co.* v. *Lemon* (1908) 163 Fed. 145, 147-152.

[30] 4 *Federal Trade Rep.* (Decem. 1, 1915) 665, 667.

gested, or otherwise. Interesting possibilities suggest themselves as to the consequences to the members of the Commission, under the Sherman Law and other statutes relating to conspiracies,[31] if the Commission should assume to give advance approval of any given proposed trade plan, and it should subsequently turn out, after the plan had been executed, or was in process of execution, that the antitrust laws had been, or were being, violated thereby. And, of course, it is abundantly clear that no informal ruling by the Commission could protect any person relying upon it, if a course of conduct in trade, approved in advance by the Commission, should subsequently be drawn into question before a court, and be deemed unlawful by the court. Even when an administrative officer possesses unquestionable authority to make a ruling or regulation determinative of what specific act or acts, if performed, shall, or shall not, constitute a violation of a general rule or standard of conduct fixed by statute, the government is not estopped to proceed against a violator of the statute by the circumstance that the act constituting the violation was within the terms of the administrative ruling, if the act was in truth repugnant to the statute.[32]

§ 9. **Violations of the Clayton Law:** As rules of conduct, sections two, three, seven and eight of the Clayton Law are indisputably vague.[33] The general nature of the acts, that is, price discriminations, exclusive purchase and sale arrangements, intercorporate shareholding, and interlocking directorates, which those sections of the Clayton Law denounce as unlawful, is

[31] See, for instance, 4 U. S. Comp. Stat. (1913) Tit. 69A, Ch. 4, Sec. 10201, p. 4694.

[32] *William J. Moxley* v. *Hertz* (1911) 185 Fed. 757, 760.

[33] See Sec. 4, *supra;* Secs. 10 to 12, *infra.*

clear enough. But the general declarations of what is unlawful are so hedged about with qualifications, provisos, and exceptions as to inject a large element of uncertainty into a determination of whether a given act or course of conduct, if pursued, will or will not constitute a violation of the Clayton Law and give occasion for the institution of preventive proceedings by the Commission.[34]

§ 10. **Price discriminations, and exclusive purchase and sale arrangements:**[35] Neither a discrimination in price between different purchasers of commodities, nor an exclusive purchase and sale arrangement, is unlawful under the Clayton Law, unless the "effect" thereof may be "to substantially lessen competition or tend to create a monopoly in any line of commerce."[36] In thus making the unlawfulness of a discrimination in price and of an exclusive purchase and sale arrangement depend upon whether its "effect" may be "to substantially lessen competition, or tend to create a monopoly", the Clayton

[34]See note 37, *infra*.

[35]Clayton Law, Secs. 2 and 3.

[36]While obviously, as was said in *United States* v. *Keystone Watch Case Co.* (1915) 218 Fed. 502, 507, "restraint of trade * * * is not always the same thing as the mere restraint of competition", nevertheless the words "to substantially lessen competition", as used in the Clayton Law, appear to mean neither more nor less than substantially and unreasonably to restrain trade. In *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.* (1915) 224 Fed. 566, 574, Hough J., referring to the Clayton Law, said that section two thereof "*plainly identifies the lessening of competition with restraint of trade*" (our italics). In *Standard Oil Co.* v. *United States* (1911) 221 U. S. 1, 57, 61, Mr. Chief Justice White said that "acts which it was considered had a monopolistic tendency, especially those which were thought to unduly *diminish competition* * * * came also in a generic sense to be spoken of and treated * * * as being in *restraint of trade*", and that "the acts which produce the *same result as monopoly* * * * all came to be spoken of as, and to be indeed *synonymous with, restraint of trade*" (our italics). Cf., note 38, *infra*.

Law renders it exceedingly difficult for a person engaged in interstate commerce to tell in advance whether, if he shall discriminate in price between purchasers or make an exclusive purchase and sale arrangement he will thereby violate the law, because in the nature of things he cannot foresee very clearly what ultimate "effect" upon competition, trade, and monopoly his conduct may have.[87]

[87]Since the words "to substantially lessen competition" as used in the Clayton Law appear to mean, in effect, unduly to restrain trade (note 36 *supra*, note 38, *infra*), the "rule of reason" is of course as much a part of the Clayton Law as it is of the Sherman Law. *Standard Oil Co.* v. *United States* (1911) 220 U. S. 1, 60. Cf., note 55, *infra*. And the essential uncertainty of the "rule of reason" cannot be gainsaid, especially when the standard of reason must be applied prophetically to determine in advance the lawfulness of the possible or probable effect of a given course of conduct, if such course of conduct shall be adopted. "But * * * where is a court to find the standard of reason? It seems to us that it must be found in the gradually accumulated results of general experience and observation, in the gathered wisdom of the community, for this is the product of a common and a prolonged effort by men who theorize and by practical men alike to deal as fairly, as justly, and as equitably as may be possible with situations that are often obscure and complicated, and of high importance to large classes and to many individuals. Obviously a standard should have a true relation to the subject measured; and, since the inquiry here is whether in a given case trade is likely to be, or has actually been, unduly restrained, reason can answer the question only by going to the facts of life and drawing upon the accumulated store of knowledge. * * * *When should the standard of reasonableness be applied?* Evidently this will depend on the time when the question is submitted for decision. This time may either *precede the proposed course of conduct*, or it may follow the beginning of such a course so quickly that no body of experience, or no sufficient body, has yet come into existence. In that event the nature of things compels the court to enter *the field of prophecy*, or of probable anticipation. In such a situation, nothing else can be done. * * * In this world we must do our best with the means at our disposal. Even if *prophets are always in danger of being discredited by the event*, we are sometimes compelled to speculate about the fu-

As to price discriminations, further uncertainty as to what will constitute a violation of law arises out of the declaration in section two of the Clayton Law that vendors of goods in interstate commerce shall not be prevented from selecting their own customers[38] in *bona fide* transactions, and not in restraint of trade, and that a discrimination in price between different purchasers of commodities may be made with propriety if the discrimination (1) is on account of differences in the grade,

ture; and our duty .then is to check our speculations as much as possible by taking account of such probabilities as may arise from past experience and observation." McPherson J. in *United States* v. *Keystone Watch Case Co.* (1915) 218 Fed. 502, 516-517 (our italics). Cf., also note 71, *infra*.

[38]In *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.* (1915) 224 Fed. 566, 574, Hough J., referring to section two of the Clayton Law said: "But price discrimination is only forbidden when it 'substantially' lessens competition. Construing the whole section together, the last exception reads in effect that a 'vendor may select his own *bona fide* customers providing the effect of such selection is not to *substantially* and *unreasonably* restrain trade'" (court's italics). In the same case, on appeal (227 Fed. 46, 49), Lacombe, J., held that neither under the Sherman Law, nor the Clayton Law, had we "yet reached the stage where the selection of a trader's customers is made for him by the government", the trader's business not constituting a monopoly or a quasi-monopoly. Cf., also, note 36, *supra*. The extent of the right of a trader to select his own customers, in the sense of refusing to supply his goods to anybody except upon some restrictive condition, as for instance that the purchaser should not sell the article purchased for less than a fixed minimum price, and then enforcing that restrictive condition, was a matter of uncertainty, especially as to patented articles, prior to the enactment of the Clayton Law. See *Dr. Miles Medical Co.* v. *Park & Sons Co.* (1911) 220 U. S. 373, and *Bauer* v. *O'Donnell* (1913) 229 U. S. 1, in both of which cases the court was of divided opinion; and *Ford Motor Co.* v. *Union Motor Sales Co.* (1914) 225 Fed. 373, and *American Graphaphone Co.* v. *Boston Store* (1915) 225 Fed. 785, which appear to be in conflict with each other. See also *United States* v. *Motion Picture Patents Co.* (1915) 225 Fed. 800, 805. It is not apparent that the Clayton Law has dissipated any of the uncertainty which, prior to its enactment, existed in that regard.

quality, or quantity of the commodity sold, or (2) makes only due allowance for difference in the cost of selling or transportation, or (3) is made in good faith, in the same or different communities to meet competition.

§ 11. **Intercorporate shareholding:** Equal difficulty and uncertainty is involved in determining when intercorporate shareholding, and the acquisition of stock by a holding company, will constitute a violation of the Clayton Law.

The acquisition by one corporation engaged in commerce of the stock of another, and the acquisition by a corporation not engaged in commerce of the stock of two or more corporations which are so engaged, are forbidden by the Clayton Law[39] only if "the effect of such acquisition may be to substantially lessen competition" between the corporations engaged in commerce, or "to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." If one corporation shall acquire shares of stock of another, it is manifestly impossible to foresee accurately what ultimately may be the "effect" thereof upon competition, restraint of commerce, and monopoly.[40] If, after the acquisition by one corporation of the stock of another, competition between the corporations shall be lessened to a degree, it must necessarily be exceedingly difficult, if not impossible, to establish with reasonable certainty either that the acquisition of the stock stands as a cause for the lessening of competition as an effect, or that competition has been so "substantially" lessened as to result in a violation of the Clayton Law.

That, however, is not all. Not only is the rule against intercorporate stock-ownership vague in terms and difficult of application, but in addition numerous exceptions

[39]Clayton Law, Sec. 7. [40]See note 37, *supra*.

are engrafted upon it. Subject to the proviso that nothing in section seven of the Clayton Law shall be construed to authorize or make lawful anything which, prior to the enactment of the Clayton Law was forbidden by the antitrust laws, the rule in said section seven against intercorporate shareholding does not apply at all (1) when one corporation purchases shares of the capital stock of another solely for investment, and does not vote or otherwise use the shares to bring about, or to attempt to bring about, a substantial lessening of competition; or (2) when a corporation causes the formation of subsidiary corporations for the purpose of actually carrying on their immediate lawful business, or the branches or extensions thereof, and owns and holds all or a part of the stock of such subsidiary corporations if the effect of forming the subsidiaries is not substantially to lessen competition; or (3) when a common carrier, subject to the laws regulating interstate commerce, constructs branches or short lines, as feeders to its main line, and acquires a part or all of the capital stock of such branch lines; or (4) when such common carrier acquires a part, or all, of the capital stock of a branch or short line constructed by an independent company, if there is no substantial competition between the company which constructs or owns the branch line, and the common carrier which acquires the stock of the branch line; or (5) when such common carrier, for the purpose of extending its line, acquires the stock of another common carrier, if there is no substantial competition between the two carriers.

Intercorporate shareholding by banks, banking associations, and trust companies, and by common carriers subject to the jurisdiction of the Interstate Commerce Commission, of course does not concern the Trade Com-

mission.[41] But corporations subsidiary to such common carriers might be engaged in interstate commerce within the purview of the Clayton Law, and at the same time might not be so engaged in interstate commerce as to be subject to the jurisdiction of the Interstate Commerce Commission under the laws regulating interstate commerce. Such subsidiaries, and all other corporations subject to the jurisdiction of the Trade Commission, must necessarily find it hard to determine with reasonable certainty whether, if they shall participate in arrangements for intercorporate shareholding, or for the acquisition of stock by holding companies, their acts will involve them in difficulties with the Trade Commission as violating section seven of the Clayton Law, or will be held to fall within some of the exceptions expressed in that section.

§ 12. **Interlocking directorates:** The Clayton Law does not inhibit interlocking directorates until from and after October 15, 1916,[42] and the enforcement of the inhibition is entrusted to the Federal Reserve Board, and the Interstate Commerce Commission, respectively, so far as banks and common carriers are concerned.[43] If an unlawful interlocking directorate

[41]Clayton Law, Sec. 11.

[42]That is, until two years after the date of the approval of the Clayton Law. See Sec. 8 of said law. On the phraseology of said Sec. 8, a question might be raised as to whether the suspension for two years of the inhibition against interlocking directorates granted by the first paragraph of said section, is applicable in the case of federal banks in cities of more than 200,000 inhabitants covered by the second paragraph of said section. The Solicitor of the Treasury in an opinion dated November 24, 1914, rendered for the Federal Reserve Board, has, however, held that the banks covered by the second paragraph were as much within the two-year suspension clause of said section as were the banks covered by the first paragraph thereof.

[43]Clayton Law, Sec. 11. The inhibition against interlocking directorates does not apply to "common carriers subject to the act to

should be created by a bank, or by an interstate common carrier within the operation of the Clayton Law, the Trade Commission could not exert its regulative power upon the corporation. But it would seem that the Trade Commission might proceed against the individual director, officer, or employee taking part in the violation of the law, if his participation in the management of the corporation constituted engaging in interstate commerce on his part.

(1) *Banking corporations.* There is perhaps a less degree of uncertainty as to when the creation of an interlocking bank directorate will constitute a violation of the Clayton Law, than has been noted to exist in respect of price discriminations, exclusive purchase and sale arrangements, and intercorporate shareholding.

So far as the eligibility of the director of one bank for lawful membership in the directorate of another, depends upon the aggregate amount of the deposits, capital, surplus, and undivided profits of the banks, or either of them, section eight of the Clayton Law provides a reasonably certain rule for ascertaining such aggregate amount, by declaring that it shall be the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank filed as provided by law during the fiscal year next preceding the date set for the annual election of directors.

The exceptions to the statutory inhibition against interlocking bank directorates are fewer in number, and

regulate commerce, approved February fourth, eighteen hundred and eighty-seven". See Clayton Law, Sec. 8. That means, of course, common carriers by rail or water. It would seem that other kinds of interstate carriers, such as pipe lines, telegraph companies, and the like, which have been made subject to the act to regulate commerce by amendments thereof since 1887, are within the rule of the Clayton Law against interlocking directorates.

less elastic in character, than the exceptions to the rules declared by the Clayton Law against price discriminations, exclusive purchase and sale arrangements, and intercorporate shareholding. The statutory rules of section eight of the Clayton Law prohibiting interlocking bank directorates are of universal and rigid application, except that (a) they do not apply to mutual savings banks not having a capital stock represented by shares; (b) a director of a federal bank, in respect of which an interlocking directorate with another bank is otherwise forbidden, may be a director of not more than one other bank, federal or state, where the entire capital stock of one of the banks having a common director is owned by the stockholders of the other; and (c) a director of "Class A" of a federal reserve bank may be an officer or director, or both, of one member bank.

(2) *Non-banking corporations.* As to interlocking directorates in the case of such corporations other than banks as are within the operation of the Clayton Law, it is quite as difficult to tell what will constitute a violation of section eight of the Clayton Law as in the case of price discriminations, exclusive purchase and sale arrangements, and intercorporate shareholding. So far as the inhibition against interlocking directorates in such non-banking corporations depends upon the aggregate amount of capital, surplus and undivided profits of the corporations, or either of them, the Clayton Law is definite and certain. It declares that the eligibility of the director of one such corporation for membership in the directorate of the other shall be ascertained by taking the aggregate amount of the corporation's capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the corporation's fiscal year next preceding the election of directors.

But the exception to the rule forbidding interlocking directorates as to corporations within the operation of the Clayton Law, other than banks, is very indefinite and uncertain. Two such corporations, regardless of how great may be the amount of the capital, surplus and undivided profits of either or both of them, may have interlocking directorates unless such corporations are, or previously shall have been, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws. This obviously makes the lawfulness of interlocking directorates created by two such corporations, depend finally upon an interpretation of the antitrust laws. If the two corporations, being otherwise within the terms of the Clayton Law, are competitors so that elimination of competition between them by agreement would violate any provision of the antitrust laws, they may not lawfully have interlocking directorates. Otherwise they may. It would be difficult to conceive a more uncertain and shifting standard of corporate conduct than this one, by which the question of what elimination of competition between two corporations by agreement would constitute a violation of the antitrust laws, is made the test of the lawfulness of an interlocking directorate between such corporations.[44]

§ 13. Clayton Law creates merely a new remedy: It appears doubtful, to say the least, whether sections two, three, seven, eight, and eleven of the Clayton Law have materially changed the previously existing substantive law of interstate trade. It would seem that, prior to the enactment of the Clayton Law, the devices for restraining trade and creating monopoly denounced by that stat-

[44]Cf., note 37, *supra*.

ute, might have been reached under the Sherman Law.[45] Thus the so-called "Gary Dinners" held to regulate prices in the iron and steel industry, appear to have represented a lesser degree of co-operation to eliminate competition in interstate trade than that which would result from such interlocking directorates as are forbidden to commercial corporations by the Clayton Law. The "Gary Dinners" offended against the Sherman Law.[46] Again, exclusive purchase and sale arrangements such as are declared unlawful by section three of the Clayton Law, were prominent features in several cases wherein the government obtained decrees under the

[45]The all-embracing scope of the Sherman Law has been emphasized repeatedly. In *United States* v. *Keystone Watch Case Co.* (1915) 218 Fed. 502, 515-516, McPherson J., referring to the Sherman Law, said: "The act of 1890 is directed against restraint of interstate or foreign trade * * * Trade may be restrained * * * in many ways and by many devices, but these are *all* covered by the first and second sections of the act. In these sections two classes of prohibited acts are described: (1) The concerted action of two or more persons, which may take the form of a contract, a combination in whatever form, or a conspiracy; and (2) monopoly, or the attempt to monopolize, which may be the act of one person alone, or of more than one. These two classes are intended to be *all-embracing, and thus far in the history of the statute no variety of device has escaped their sweep*" (our italics). In *Standard Sanitary Mfg. Co.* v. *United States* (1912) 226 U. S. 20, 49, Mr. Justice McKenna said that the "comprehensive and thorough character" of the Sherman Law, and "its sufficiency to prevent evasions of its policy, 'by resort to any disguise or subterfuge of form' or the escape of its provisions 'by any indirection'," had been demonstrated. In *Standard Oil Co.* v. *United States* (1911) 221 U. S. 1, 62, Mr. Chief Justice White, referring to the Sherman Law, said that "the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of *every kind or nature*" (our italics). See also *United States* v. *American Tobacco Co.* (1911) 221 U. S. 106, 178-181. Cf., note 93, *infra*.

[46]*United States* v. *U. S. Steel Corporation* (1915) 223 Fed. 55, 154-161, 173-178.

Sherman Law.[47] So, also, as to intercorporate shareholding against which section seven of the Clayton Law is directed.[48] It may perhaps be that in so far as section three of the Clayton Law, in forbidding exclusive purchase and sale arrangements, thereby prohibits the selling or leasing of a patented article, as for instance a machine, upon a restrictive condition binding the purchaser or lessee not to use in connection with such article any supplies obtained from a competitor, or from any source except the patentee, pre-existing law has to that extent been changed. That such is the case cannot, however, be asserted very confidently, because the extent of the right of a patentee to make such so-called "tying" contracts was not very clearly or certainly defined before the Clayton Law was enacted,[49] and considering the limitations upon the prohibition of "tying" contracts, as found in the Clayton Law,[50] the right of a patentee to make such contracts is hardly, if at all, less vague and uncertain than it was before that statute was enacted. Thus viewed, the principal effect upon pre-existing law of sections two, three, seven, eight, and eleven of the Clayton Law appears to have been merely the

[47] *United States* v. *Great Lakes Towing Co.* (1913) 208 Fed. 733, 738-739, 743, 745; *United States* v. *Keystone Watch Case Co.* (1915) 218 Fed. 502, 511; *United States* v. *Motion Picture Patents Co.* (1915) 225 Fed. 800, 809; *United States* v. *Eastman Kodak Co.* (1915) 226 Fed. 62, 73.

[48] *United States* v. *Union Pacific R. R. Co.* (1912) 226 U. S. 61, 86, 95-96; *United States* v. *American Tobacco Co.* (1911) 221 U. S. 106, 143-148, 176.

[49] *Henry* v. *Dick Co.* (1912) 224 U. S. 1, in which the court was of divided opinion; *United States* v. *Winslow* (1913) 227 U. S. 202, 204, 205, 216-217; *Elliott Machine Co.* v. *Center* (1915) 227 Fed. 124; *United States* v. *United Shoe Machinery Co.* (1915) 227 Fed. 507, 510-511.

[50] Secs. 4, 10, *supra*. As to the retroactive operation of the provisions of the Clayton Law relating to "tying contracts", see *Elliott Machine Co.* v. *Center* (1915) 227 Fed. 124; *United States* v. *United Shoe Machinery Co.* (1915) 227 Fed. 507, 510-511.

creation of a new remedy, in the form of statutory proceedings[51] by the Trade Commission, for wrongs against which, prior to the enactment of the Clayton Law and ever since the enactment of the Sherman Law, all the power of the government could be brought to bear.

§ 14. Violations of the Trade Law: The rule of conduct prescribed by the Trade Law is even more uncertain than the rules established by the Clayton Law in respect of price discriminations, exclusive purchase and sale arrangements, intercorporate shareholding, and interlocking directorates. The Trade Law declares merely that "unfair methods of competition in commerce" are unlawful.[52] Unlike the Clayton Law, the Trade Law does not make explicit even the general nature of the acts and conduct which it denounces as unlawful. It does not in any way define or describe what shall constitute "unfair methods of competition in commerce," which it authorizes the Trade Commission, in the exercise of its regulative power, to prevent. What trade practices are inhibited by the Trade Law depends, therefore, upon what may be the sound interpretation of the statute.

§ 15. Injury to public essential to violation of Trade Law: There would seem to be adequate grounds to support the conclusion that in declaring "unfair methods of competition in commerce" to be unlawful, and authorizing the Trade Commission to institute proceedings to prevent such methods, Congress intended to denounce a public, as distinguished from a private, injury in respect of trade.

Congress would hardly undertake, if indeed it has the power, to create and maintain at the cost of the public

[51] Clayton Law, Sec. 11; and Sec. 29, *infra*.

[52] Trade Law, Sec. 5.

an administrative body to prevent, at public expense, any competitive trade practice essentially injurious merely to the individuals directly affected thereby. Moreover, by the terms of the Trade Law, the Trade Commission is required to institute proceedings to prevent the competitive methods generically denounced by the statute, only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the *interest of the public.*" The presence and force of that phrase in the Trade Law should not, it would seem, be overlooked.

What is to the "interest of the public" in respect of preventing or encouraging any method of competition would seem quite clearly to be essentially a legislative question, and it is not open to doubt that the Constitution forbids that the Trade Commission should be made a repository of legislative power. It therefore seems probable that in order to avoid a construction of the Trade Law which would make that statute of at least doubtful constitutionality, the courts will hold that, by authorizing the Trade Commission to exert its regulative power if it should appear to the Commission that the institution of proceedings by it looking to the prevention, by the decree of a competent court, of unfair methods of competition would be to the "interest of the public," Congress did not intend to delegate to the Commission the duty of determining the requirements of a sound public policy in respect of methods of competition, and did not intend to confer upon the Commission uncontrolled power to suppress this, or encourage that, method of competition, according as the Commission, in the exercise of a wise discretion, might consider the one method of competition harmful, and the other beneficial, to the public. If that conclusion be sound, it would seem to follow therefrom that, when enacting the Trade Law, Congress must have entertained the view that there was

already in existence, in pre-existing law, some established rule or standard of what was to the "interest of the public" in respect of competition in trade, and must have intended to require that the Trade Commission should refer to, and be guided by, that rule or standard in discharging its administrative function of instituting proceedings designed to bring about action by competent courts to prevent unfair competitive practices.[53]

When the pre-existing law is examined to ascertain what rule or standard Congress, by the use in the Trade Law of the phrase "interest of the public," intended to impose upon the Trade Commission for its guidance and control in determining when it should, and when it should not, institute proceedings with a view to having the courts enjoin any competitive method as unfair and so repugnant to the Trade Law, it appears that the only conduct in respect of competition in trade which our system of law has ever recognized as wrong and prejudicial to the "interest of the public," is such conduct as may result in undue and unreasonable restraint of trade and the creation or perpetuation of monopoly, which are or may be attended by the enhancement of prices, the destruction of individual opportunity, initiative and independence, and other like injuries to the whole people.[54]

[53]The Clayton Law does not contain any such provision in respect of the "interest of the public" as is found in the Trade Law. Such provision in the Clayton Law would be superfluous. Its place is supplied by those terms of the Clayton Law which expressly make a substantial lessening of competition, and a tendency to create monopoly essential to the unlawfulness of the acts inhibited by sections two, three, seven, and eight of the Clayton Law. See note 36, *supra*.

[54]In *Nash* v. *United States* (1913) 229 U. S. 373, 376, Mr. Justice Holmes, referring to the Sherman Law, said "that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, *prejudice the public interests* by unduly restricting competition or unduly obstructing the course of trade"

It would therefore seem to follow that an indispensable attribute of any and every method of competition which lies within the inhibition of the Trade Law, must be a tendency, or a susceptibility of use, to restrain interstate or foreign trade unduly, or to create or perpetuate monopoly.[55]

(our italics). See also *United States* v. *American Tobacco Co.* (1911) 221 U. S. 106, 179. In *United States* v. *International Harvester Co.* (1914) 214 Fed. 987, 1005, Sanborn J., referring to the Sherman Law, said: "It is equally well established that the reason for the prohibition by the English rule of public policy and by the statute under consideration of unreasonable restraints of and attempts to monopolize trade was and is that, by unduly restricting competition, they are *injurious to the public* in that (1) they raise the prices to the consumers of the articles they affect, (2) limit their production, (3) deteriorate their quality, and (4) decrease the wages of the labor and the prices of the materials required to produce them. * * * Undue injury in the ways just stated to the public (that is to say, to the consumers and makers of the articles produced or sold) is the basis and reason for the prohibition and the test of undue or unreasonable restraint or attempt to monopolize" (our italics). See also, *Standard Oil Co.* v. *United States* (1911) 221 U. S. 1, 52, 78; *United States* v. *St. Louis Terminal* (1912) 224 U. S. 383, 409. In applying the test of what the "public interest requires" as the measure of the relief which should be granted to the government in a suit under the Sherman Law, it was held in *United States* v. *Keystone Watch Case Co.* (1915) 218 Fed. 502, 519, that the "public interest" required only that the defendant should discontinue the policy of boycott, and the practice of seeking by mere notices to retailers, with whom it was not in any privity of relationship, to prevent the sale of its patented product for less than a certain minimum price. Otherwise stated, the only acts held injurious to the *"public interest"* were acts which tended directly to restrain trade, perpetuate monopoly, and enhance prices.

[55]That conclusion, of course, makes the "rule of reason" a part of the Trade Law, just as it is a part of the Clayton Law, as was noted elsewhere. See note 37, *supra*. It also excludes from the cognizance of the Trade Commission trade practices which, howsoever unfair, nevertheless result ordinarily in merely private wrongs, injurious only to the persons directly affected thereby, such for instance as trade libels, consisting of the disparagement of the goods of a rival, *Everett Piano Co.* v. *Maus* (1912) 200 Fed.

That view assimilates the power of the Trade Commission in respect of regulating competition, to its other powers. The nature of the acts denounced by those portions of the Clayton Law which the Trade Commission is authorized to enforce,[56] and the nature of the subject-matter in respect of which the Commission's advisory and investigative powers are to be exercised,[57] show that the Commission was created to assist in combating the same evils of restraint of trade and monopolization against which the antitrust laws are directed. Nothing suggests that Congress intended that the Trade Commission should go outside that field of action in exercising the regulative power conferred upon it by the Trade Law in respect of competition.

718, *Victor Safe & Lock Co.* v. *Deright* (1906) 147 Fed. 211, *Nonpareil Cork Mfg. Co.* v. *Keasbey & Mattison Co.* (1901) 108 Fed. 721, *Gott* v. *Pulsifer* (1877) 122 Mass. 235; "unfair competition", in the sense of imitating the name or label of a trade rival, or the trade dress of his goods, and thereby deceiving the public and palming off upon it one's own goods as and for the goods of another, which act obviously may, or may not, injure the public in a pecuniary sense, depending upon whether the goods so deceitfully palmed off upon the public are inferior or equal in quality to the goods of the trader whose name or label is imitated, *McLean* v. *Fleming* (1877) 96 U. S. 245, *Goodyear Co. v. Goodyear Rubber* Co. (1888) 128 U. S. 598; slander of title to a patent, *Flint v. Hutchinson Smoke Burner Co.* (1892) 110 Mo. 492, *Cousins* v. *Merrill* (1865) 16 U. C. C. P. 114; and sending out false notices that a rival's goods are made in infringement of a patent, and threatening in bad faith to sue the purchasers of such goods as infringers, *Adriance Platt & Co.* v. *National Harrow Co.* (1903) 121 Fed. 827, *Emack* v. *Kane*, (1888) 34 Fed. 46. If, however, those practices, although usually and ordinarily private wrongs merely, should be adopted for the purpose of unduly restraining trade or acquiring a monopoly and should be found susceptible of effective use to accomplish that wrong to the public then it would seem that the Trade Commission might take cognizance of them under its power to prevent unfair methods of competition.

[56]Secs. 4, 9, 10, 11, 12, *supra.*

[57]Secs. 5, 6, *supra;* Chapters III and IV, *infra.*

Again, the fact that in order to prevent the methods of competition generically declared unlawful by the Trade Law, Congress has provided substantially the same statutory proceedings[58] as to enforce compliance with sections two, three, seven and eight of the Clayton Law, suggests that the competitive methods intended to be denounced by the Trade Law are acts of the same general nature, susceptible of being adequately prevented by the same proceedings, as the price discriminations, exclusive purchase and sale arrangements, intercorporate shareholding, and interlocking directorates which are specifically described and declared unlawful in the Clayton Law. The indicia of unlawfulness common to all of the practices forbidden by sections two, three, seven and eight of the Clayton Law are the eliminating or substantial lessening of competition, the restraining of commerce, and the creating of monopoly.[59] The same indicia must, it would seem, be indispensable to a competitive trade practice before it can be held to be within the purview of the Trade Law.

That conclusion accords with the sense in which the words "unfair methods of competition" were used in the majority opinion of the United States Supreme Court in the *Standard Oil Company Case.*

In that case, in outlining the contents of the government's bill of complaint, Mr. Chief Justice White, for the majority of the court, said that after charging that the Standard Oil Trust and the Standard Oil Company had monopolized and restrained interstate commerce in petroleum, "the bill at great length additionally set forth various means by which * * * the monopoly and restraint complained of was continued." The averments of the bill as to the various means by which the monopoly and

[58]Sec. 29, *infra.*

[59]Secs. 4, 9, 10, 11, 12, *supra.*

restraint, once established, had been continued could, the Chief Justice said, properly be grouped under the head, among others, of "restraint and monopolization by * * * *unfair methods of competition,* such as *local price cutting* at the points where necessary *to suppress competition; espionage* of the business of competitors, the operation of *bogus independent companies,* and *payment of rebates* on oil, with the *like intent*" (our italics).[60]

The phrase "unfair methods of competition" thus appears to have been used by the Supreme Court as generically descriptive of various trade practices the effect of which had been to suppress competition, restrain trade unduly, and create or perpetuate monopoly. That use of the phrase in the *Standard Oil Company Case* was brought to the attention of the Senate while the Trade Law was being debated there.[61] It therefore seems reasonable to conclude that when Congress inserted the words "unfair methods of competition" in the Trade Law, the legislative intention was that those words should be understood and construed in the same sense as that in which the Supreme Court had used them.

§ 16. Unfairness essential to violation of Trade Law: It is not, however, to be concluded that the fact that the effect of a given trade practice may be to suppress competition, restrain trade unduly, and create or perpetuate monopoly is sufficient, in and of itself, to make such practice unlawful within the purview of the Trade Law. To reach that conclusion would be to ignore the character of the practices mentioned illustratively in the *Standard Oil Company Case*[62] as "unfair methods of competition," and to fail to give due effect to the word "unfair" as

[60] *Standard Oil Co.* v. *United States* (1911) 221 U. S. 1, 42-43.

[61] 51 Cong. Rec. 13220, 13225 (bound vol. pp. 12143, 12148).

[62] Sec. 15, *supra.*

used in the Trade Law. Conceivably, an individual engaged in commerce might possess such superior foresight, business sagacity, and industrial efficiency, that by the use of only such competitive methods as everybody would concede to be in the highest degree ethical and proper, he would be able to overwhelm every rival in his field of commerce, and to establish a complete monopoly. The Trade Law is probably not to be understood as forbidding that.[63] Before any given trade practice can be held to be within the operation of the Trade Law, and the regulative power of the Trade Commission, it is apparently essential not only that the effect of the practice should be to suppress competition, restrain trade

[63] "I would not say that every person who strives to gain as much as he can of the commerce in a commodity is thereby attempting to monopolize that commerce, within the meaning of the term as it is employed in legislative acts and understood in the courts. Magnitude of business does not, alone, constitute a monopoly, nor effort at magnitude an attempt to monopolize." Hook J., in *United States* v. *Standard Oil Co.* (1909) 173 Fed. 177, 195. See also *United States* v. *U. S. Steel Corporation* (1915) 223 Fed. 55, 96. "A monopolizing by efficiency in producing and marketing a better and cheaper article than anyone else is not within it [i. e. the Sherman Law]. However, possibly, efficiency is so abundant that in experience there never will be, as there never has been, such a monopolizing." Cochran J., in *Patterson* v. *United States* (1915) 222 Fed. 599, 619. "Congress certainly did not intend to condemn the proper exercise of business zeal and energy * * * As population has swelled, and as vast aggregations of men have multiplied their wants, the inevitable trend of modern affairs has called for large business enterprises, as well as for small; and we think it no more than reasonable to say that, when a large business has proved itself to be beneficial and not harmful to the community, it should not be condemned merely because it is large." McPherson J., in *United States* v. *Keystone Watch Case Co.* (1915) 218 Fed. 502, 518. "There is no limit in this country to the extent to which a business may grow." Hazel J., in *United States* v. *Eastman Kodak Co.* (1915) 226 Fed. 62, 80. See also, Sheppard J., in *United States* v. *American Naval Stores Co.* (1909) 172 Fed. 455, 457-458, 459, quoted in note 93, *infra*. Cf., however, note 86, *infra*.

unduly, and create monopoly, but also that the practice should be "unfair."

§ 17. **What is "unfair":** The word "unfair" is undeniably indefinite in sense and meaning. What one person may consider "unfair" in competitive trade, another may perhaps regard as legitimate. Conceivably, members of a court may disagree as to whether or not, under the circumstances of a particular case, a given method of competition is "unfair", just as in one case they were unable to agree and adjudge whether or not certain regulations there involved constituted an "unreasonable" restraint of trade within the purview of the Sherman Law.[64] That, however, is of no consequence, so far as concerns the validity of the Trade Law. The Trade Law does not purport to denounce any competitive act as a crime. It does not provide for the imposition of a fine upon, or for the imprisonment of, any person guilty of practising "unfair methods of competition." Whatsoever the peril, under the Sherman Law,[65] of practising "unfair methods of competition", a person resorting to such practices incurs no other risk, under the Trade Law, than that the Trade Commission, by proceeding as pointed out in the statute, may obtain the order of a court requiring him to cease and desist from such practice. Vague as it is in making unfairness a standard of unlawfulness in respect of methods of competition in commerce, the Trade Law would nevertheless seem to be sufficiently definite to escape being declared void for uncertainty.[66]

[64] *United States* v. *Periodical Clearing House*, an unreported case, referred to in 216 Fed. 973.

[65] Secs. 27, 28, *infra*.

[66] *Nash* v. *United States* (1913) 229 U. S. 373, 376-378; *Standard Oil Co.* v. *United States* (1911) 221 U. S. 1, 69-70; *Mutual Film Corp.* v. *Ohio Indus'l Comm.* (1915) 236 U. S. 230, 245-246, 247; *Fox* v. *Washington* (1915) 236 U. S. 273. Cf., *International Harvester Co.* v. *Kentucky* (1914) 234 U. S. 216, 221-224. See also, note 37, *supra*, and note 71, *infra*.

So far as the practical administration of the Trade Law is concerned, the elasticity of meaning of the word "unfair", as applied to competitive practices, may result in some difficulty. But the Trade Commission and the courts must make shift to determine as best they may, from the circumstances of each case, whether the particular competitive practice involved therein is "unfair" within the meaning of the Trade Law, just as other agencies of government have to determine other questions for the solution of which there is no very certain standard to which reference may be made, as for instance the question of what constitutes an "unjust" discrimination, and what an "undue" preference, under the interstate commerce laws,[67] and what an "undue" and "unreasonable" restraint of trade under the Sherman Law.[68]

The difficulty of determining what is "unfair," within the purview of the Trade Law, is hardly to be regarded as insuperable. Prior to the enactment of the Trade Law, the courts in discussing monopoly cases not involving any "unfair competition" in the accepted sense of palming off one man's goods as and for the goods of another,[69] had referred to the "business conduct" of a corporation "towards its competitors" as "honorable, clean and fair," and had used such expressions as "legitimate competition" and "fair competition," and "unfair competition."[70] If the courts knew then, as it must be assumed they did, what business conduct on the part

[67] 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Secs. 8564, 8565, p. 3825.

[68] See note 37, *supra.*

[69] See note 55, *supra.*

[70] *United States* v. *International Harvester Co.* (1914) 214 Fed. 987, 1002; *United States* v. *Standard Oil Company* (1909) 173 Fed. 177, 191, 197; *Ware-Kramer Tobacco Co.* v. *American Tobacco Co.* (1910) 180 Fed. 160, 165, 170; *United States* v. *Patterson* (1913) 205 Fed. 292, 297, 301.

of a corporation towards competitors was honorable, clean and fair, and what competition was legitimate, fair, and unfair, they can probably apply with reasonable satisfaction the word "unfair" as used in the Trade Law in forbidding "unfair methods of competition."[71]

Likewise individuals engaged in commerce who really wish to obey the Trade Law's inhibition against "unfair methods of competition," will probably be able for the most part to keep on the side of safety. Within limits, the word "fair" has about the same meaning for one normal man as for another. Persons who may be in doubt as to whether or not any given competitive method held in contemplation is fair, may find a guide to proper action in considering the requirement of "common social duty" which, although somewhat vague, has been recognized by the law as a criterion of correct conduct in analogous situations.[72] They may take account also of judicial dicta to the effect "that there is more of the Decalogue in the common law respecting the trading of merchants than is sometimes supposed,"[73] and that "the ancient adage 'Live and let live' has its application to

[71] In *United States* v. *Keystone Watch Case Co.* (1915) 218 Fed. 502, 518, in considering what was "unreasonable restraint of trade", and having in mind no doubt the Clayton Law and the Trade Law, McPherson J., said: "On this subject we are certainly able to say some things with confidence. Competitors must not be oppressed or coerced; *fraudulent or unfair or oppressive rivalry* must not be pursued. And if these words are criticized as too general, we may reply that *such generality is apparently unavoidable,* as some recent legislation of Congress testifies, and, moreover, *we may safely deny that the words are too vague for satisfactory use;* for it must be remembered that *the common agreement of moral opinion in the community furnishes an adequate guide to their practical meaning and their practical application.* They are not likely to be misapprehended or misapplied" (our italics). Cf., note 37, *supra,* and also cases cited in note 66, *supra.*

[72] *Nash* v. *United States* (1913) 229 U. S. 373, 377.

[73] *United States* v. *Standard Oil Co.* (1909) 173 Fed. 177, 196.

trade, and is a safe rule to go by,"[74] and that "competition for trade is likened to a race in which all may enter, but in which there must be no unfair jostling or hampering of others. Each one is free to exert all his powers, and distance, if he can, all competitors and win all the prizes; but he must run fairly and accord to others a like freedom."[75] They may see also what economists have regarded as unfairness in competitive practices.[76] And they may be guided by observing the nature of the practices of local price cutting, payment of rebates, operation of bogus independent companies, and espionage

[74] *United States* v. *Patterson* (1912) 201 Fed. 697, 717.

[75] *United States* v. *Motion Picture Patents Co.* (1915) 225 Fed. 800, 805.

[76] E. Dana Durand, in his lectures on "The Trust Problem", delivered at Harvard University in April, 1914, referred to "Price discriminations and other *unfair methods of competition*" (our italics). In addition to "price discriminations", he recognized as "unfair competitive methods" the obtaining of preferential rates from common carriers, and exclusive purchase and sale arrangements. 28 *Quart. Journ. Econ.* 391, 392-394. And William S. Stevens, writing on "Unfair Competition", in the Political Science Quarterly, in June and September, 1914, said: "Fair competition in an economic sense signifies a competition of economic or productive efficiency. On economic grounds an organization is entitled to remain in business so long and only so long as its production and selling costs enable it to hold its own in a free and open market. * * * Unfortunately competition is not always conducted under such conditions of equal opportunity in a free and open market. Productive and selling efficiency alone do not always permit an organization to survive, owing to the introduction of methods and practices which destroy the freedom of the market, which hamper the productive or selling efficiency of other units and which prevent efficient potential competitors from becoming actual rivals. Such artificial restrictions are clearly unfair, since they hinder or prevent other organizations from competing to the extent which their productive and selling efficiency may warrant. If there be a sound basis for competition, it lies in the preservation of the economically efficient and the destruction of the inefficient. It follows that methods which destroy the efficient along with the inefficient are economically unjustifiable and must be regarded as unfair. * * * In many cases

which were mentioned illustratively in the *Standard Oil Company Case*,[77] as "unfair methods of competition."

§ 18. **Local price cutting:** The practice of local price cutting would seem to be substantially the same practice as the price discrimination between purchasers forbidden by section two of the Clayton Law. The practice of local price cutting consists in a monopolistic concern's cutting its prices to a point below the cost of production in localities where there are competitors whom it may wish to destroy, and raising its prices in places where it has little or no competition to a point where the profits there gained will offset the losses due to price cutting in the competitive markets. After the price cutting has accomplished its purpose of driving competitors out of business, profitable prices are, of course, restored.[78]

unfairness cannot be determined except with reference to the consequences of a given act. The definition of unfair competition, therefore, should be general in terms. Any act or method of competition which hampers, injures or destroys concerns which could compete on the basis of their productive and selling efficiency should be forbidden, as should also any method except productive and selling efficiency which prevents potential competition from becoming actual competition." 29 *Polit. Sci. Quart.* 282, 283, 490. Mr. Stevens reviewed eleven practices in trade which he said were unfair from an economic standpoint as destroying competition by other means than superior producing and selling efficiency, viz: (1) Local price cutting. (2) Operation of bogus independent concerns. (3) Maintenance of "fighting ships" and "fighting brands." (4) Lease, sale, purchase, or use of certain articles as a condition of the lease, sale, purchase or use of other required articles. (5) Exclusive sale and purchase arrangements. (6) Rebates and preferential contracts. (7) Acquisition of exclusive or dominant control of machinery or goods used in the manufacturing process. (8) Manipulation. (9) Blacklists, boycotts, whitelists, etc. (10) Espionage and use of detectives. (11) Coercion, threats, and intimidation. 29 *Polit. Sci. Quart.* 284-306, 463-485. See Secs. 18 to 24, *infra*.

[77] Sec. 15, *supra*.

[78] *United States* v. *Great Lakes Towing Co.* (1913) 208 Fed. 733, 738.

§ 19. Payment of rebates: The payment of rebates is ordinarily part of an exclusive purchase and sale arrangement. It is covered by the declaration in section three of the Clayton Law, that it shall be unlawful to allow a "rebate" on the price of goods sold on condition that the purchaser shall not use the goods of a competitor. Under the usual plan for payment of commercial rebates, a seller agrees that if a purchaser shall buy a given commodity exclusively from him during a certain period, he will set aside an amount equal to a given percentage of the price of all goods bought by the purchaser during such period, and will pay over such amount to the purchaser at the end of some subsequent period if, during such subsequent period also, the purchaser shall buy such commodity exclusively from the seller.[79]

§ 20. Bogus independent companies: The operation of a bogus independent company is a device whereby a concern having, or seeking, a monopoly in any line of commerce, establishes at a place where it has troublesome competition, what ostensibly is another competitor, but in truth is merely a secret branch or agency of the parent monopolistic concern.[80] The bogus competitor, once established, proceeds to cut prices to a point below the cost of production, in a feigned trade war with its parent concern and all other rivals. If all goes well, the bogus competitor in time gets most of the business in the competitive market, and destroys independent dealers. That having been accomplished, the bogus independent company goes out of business, and leaves its creator a clear field freed from competition.

[79] *Wilder Mfg. Co.* v. *Corn Products Co.* (1915) 236 U. S. 165, 170; *United States* v. *Great Lakes Towing Co.* (1913) 208 Fed. 733, 738-739; *United States* v. *Eastman Kodak Co.* (1915) 226 Fed. 62, 73, 74.

[80] *Virtue* v. *Creamery Package Co.* (1913) 227 U. S. 8, 26.

§ 21. **Espionage:** Espionage of the business of a competitor consists of obtaining information as to the business of a competitor in greater detail, and by other methods, than is possible through ordinary business channels. The methods which have been used in the past embrace the use of spies and detectives, the bribing of the employees of common carriers, and the like. Espionage has already been the subject of specific legislation by Congress, so far as the employees of common carriers are concerned.[81] Espionage is ordinarily used not as in itself a means of suppressing competition, restraining trade, or acquiring monopoly, but in order to obtain information as a basis to accomplish those ultimate ends by some other method, as for instance by local price cutting, or exclusive sale arrangements.[82]

§ 22. **Fighting brands:** Another practice of the same general nature, and designed to accomplish the same end of destroying competition, is the use of so-called "fighting brands," "flying squadrons" and "fighting ships."[83] A "fighting brand" is a particular brand of a commodity made by a concern seeking a monopoly in its line of manufacture, for the purpose of being sold below the cost of production, solely to the customers of such concern's competitors. When by the marketing of a "fighting brand" at a price below the cost of production, all of the customers of the monopolistic concern's competitors have been won away, the manufacture and sale of the "fighting brand" is discontinued. The regular salesmen

[81] 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8583, (6), (7), p. 3855.

[82] *United States* v. *Eastman Kodak Co.* (1915) 226 Fed. 62, 78.

[83] *United States* v. *Hamburgh American S. S. Line* (1914) 216 Fed. 971, 973; *United States* v. *Eastman Kodak Co.* (1915) 226 Fed. 62, 73; decree in *United States* v. *American Thread Co.*, 51 Cong. Rec. 12246-12248 (bound vol. pp. 11228-11230).

of the monopolistic concern rarely sell a "fighting brand." For them to do so would expose such concern's connection with the "fighting brand," and so tend to defeat the purpose of putting the "fighting brand" upon the market. A "fighting brand" is usually marketed by special salesmen, known as "flying squadrons," who do not, as their principal business, handle the brands commonly offered for sale by the monopolistic concern, or solicit orders from the trade generally, but confine their activities to marketing "fighting brands" and to soliciting patronage from the customers of the monopolistic concern's competitors. So-called "fighting ships" are vessels employed by steamship combinations to prevent competitors from obtaining traffic. When a competitor of the combination seeks passengers or a cargo and announces a sailing date, the combination advertises a sailing for the same date and offers rates below the cost of transportation, with the result that the competitor cannot obtain any traffic.

§ 23. **Full line forcing:** A variation of the "tying contract", is found in the practice of "full-line forcing," so called. That device is resorted to by a concern which manufactures a number of different articles all intended for use in a single industry, as for instance in agriculture, and desires to secure or perpetuate a monopoly in that line of trade. Some one of the articles made by the monopolistic concern may be very desirable, and may be exclusively controlled by patents or otherwise. The other articles may be not any more desirable, or even less desirable, than similar articles produced by independent manufacturers. When the monopolistic concern forces dealers to carry a full line of all of its products, as a condition to supplying them with the controlled product, that constitutes what is called "full line forcing." The forcing of products upon dealers in this man-

ner, naturally drives from the market like products of independent manufacturers, and tends to create a monopoly in the hands of the concern which does the forcing.[83a]

§ 24. **Boycotts and blacklists:** Boycotts and blacklists constitute another device of the same general nature for suppressing competition and restraining trade. They are frequently employed as auxiliary to exclusive sale and purchase arrangements, and agreements to maintain prices. When so employed, they are used to render it impossible for persons who once violate an exclusive sale and purchase arrangement, or a price-fixing agreement, subsequently to do business with the concern, or concerns, seeking to create or perpetuate a monopoly. Boycotts and blacklists have also been used as direct and primary restraints upon trade in certain lines of industry.[84] Thus an association of retailers may blacklist and refuse to do business with manufacturers or wholesalers who sell directly to consumers, and wholesalers may blacklist, and refuse the ordinary trade discounts to, retailers who buy directly from manufacturers. The obvious effect of such practices is of course to restrain trade and eliminate competition.

§ 25. **Definition impossible:** Other practices of the same nature as those above reviewed, might be instanced.[85] But the illustrations given are sufficient to

[83a] *United States* v. *United Shoe Machinery Co.* (1915) 227 Fed. 507, 508-509.

[84] *Eastern States Lumber Assn.* v. *United States* (1914) 234 U. S. 600, 605-609; *Straus* v. *Am. Publishers' Assn.* (1913) 231 U. S. 222, 235; *Lawlor* v. *Loewe* (1915) 235 U. S. 522; *United States* v. *Keystone Watch Case Co.* (1915) 218 Fed. 502, 511, 512.

[85] *Nash* v. *United States* (1913) 229 U. S. 373, 375-376; *Standard Sanitary Mfg. Co.* v. *United States* (1912) 226 U. S. 20; *United States* v. *American Tobacco Co.* (1911) 221 U. S. 106, 181-182; *Peoples Tobacco Co.* v. *American Tobacco Co.* (1909) 170 Fed. 396, 399-403; *Ware-Kramer Tobacco Co.* v. *American Tobacco Co.* (1910) 180 Fed. 160, 166-168; *United States*

show the kind and nature of the trade practices which Congress appears to have intended to prohibit by declaring "unfair methods of competition in commerce" unlawful. Since what is "unfair" in respect of competitive methods, as in respect of anything else, is a relative matter, depending upon the circumstances of each particular case,[86] it is obviously impossible to work out

v. *Patterson* (1912) 201 Fed. 697, 701-704, s. c., (1913) 205 Fed. 292, 300; s. c. (1915) 222 Fed. 599; *United States* v. *U. S. Steel Corporation* (1915) 223 Fed. 55, 61-63; *United States* v. *Great Lakes Towing Co.* (1913) 208 Fed. 733, 744-745; decrees in unreported cases involving the American Thread Co., the American Coal Products Co., and the General Electric Co., printed in 51 Cong. Rec. 12246-12248 (bound vol. pp. 11228-11230).

[86]As a circumstance bearing upon the question whether or not any given trade practice constitutes an unfair method of competition, the size of the business concern pursuing the practice may be not unimportant. "A merchant may without offense add one department to another as his business prospers, or his ambition expands; for the size and the varied character of his enterprise do not in themselves violate the Anti-Trust Act. Size does not of itself restrain trade or injure the public; on the contrary, it may increase trade and may benefit the consumer; but, if the power given by the volume of a particular business is improperly used to injure either a competitor or the public, or if such power evidently tends toward the injury of either, the mischief either done or threatened is condemned by the statute [i. e., the Sherman Law]. In this connection, it may be observed that, as *power increases, the temptation to abuse it is likely also to increase, so that the acts of an influential factor in a particular trade may well be scrutinized with more suspicion than the acts of a weak and inconspicuous contributor.*" McPherson J., in *United States* v. *Keystone Watch Case Co.* (1915) 218 Fed. 502, 510 (our italics). "Whether a particular act, contract or agreement was a reasonable and *normal method* in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the *extent of the control* thereby secured over the commerce affected, as well as by the method which was used." Mr. Justice Lurton, in *United States* v. *Reading Co.* (1912) 226 U. S. 324, 370 (our italics). "Even competitive practices, of a nature which as between business rivals standing practically on even terms may be normal and lawful, yet when employed by a powerful monopolistic

anything in the nature of a definition of "unfair methods of competition," or to formulate a rule of thumb as to what may safely be done, or must certainly be avoided, under the Trade Law. About all that can be said would seem to be that no competitive practice can be an "unfair method of competition" within the Trade Law, unless the effect of the practice may be to eliminate or substantially to lessen competition, to restrain trade unduly, or to create or perpetuate monopoly, and on the other hand, that any trade method potent to eliminate or substantially to lessen competition, to restrain trade unduly, or to create or perpetuate monopoly may be held an "unfair method of competition" within the Trade Law, if such potentiality of the method be due to anything else than the user's superior industrial efficiency exerted solely through commercial practices of generally conceded propriety.

§ 26. Trade Law and Clayton Law construed together: The construction hereinabove put upon the words "unfair methods of competition" as used in the Trade Law, may perhaps be urged to be too broad. Four trade practices were mentioned in the *Standard Oil Company Case*[87] as "unfair methods of competition." Only two of those four practices, namely local price cutting and payment of rebates, were selected by Congress for express description and denunciation in the Clayton Law.[88] The Clayton Law was not approved, and did not go into

combination with the ability to crush, and for the purpose of crushing, a weak rival, may become abnormal and unlawful." *Per curiam*, in *United States* v. *Great Lakes Towing Co.* (1913) 208 Fed. 733, 744. "Generally speaking, I think that a business should not be permitted to develop to such proportions as to unreasonably engross a trade." Hazel J., in *United States* v. *Eastman Kodak Co.* (1915) 226 Fed. 62, 77. Cf., note 63, *supra*.

[87]Sec. 15, *supra*.

[88]Secs. 4, 9, 10, 11, 12, *supra*.

effect, until after the Trade Law.[89] From those circumstances, it might perhaps be argued that the legislative intention was, in and by the Clayton Law, to define and limit the meaning of the phrase "unfair methods of competition" as used in the Trade Law, so as to exclude therefrom, and from the regulative power of the Trade Commission, any trade practices affecting competition except those particularly described and specifically declared unlawful by the Clayton Law.

That such will be held to have been the legislative intention seems unlikely, however. If that narrow construction of the Trade Law and the Clayton Law should be adopted, the result of course would be to deprive the words "unfair methods of competition," as used in the Trade Law, of all effect. That result the courts will avoid, if reasonably possible.[90] The Trade Law and the Clayton Law are not inconsistent in any degree. The courts will so construe them as to give full force and effect to all of the provisions of each.[91]

When the Trade Law was upon its passage in Congress, several amendments were offered with a view to defining more or less explicitly the words "unfair methods of competition." But all such amendments were rejected. That circumstance indicates a legislative purpose, by the use of general language, not to limit the application of the regulative powers of the Trade Commission to specified acts, but rather to establish a general standard of conduct, and to leave it to the Trade Commission in the first instance, and to the courts finally,

[89] See notes 1 and 11, *supra*.

[90] *Heydenfeldt* v. *Daney Gold etc. Co.* (1876) 93 U. S. 634, 640; *United States* v. *Ninety-nine Diamonds* (1905) 139 Fed. 961, 963-964.

[91] *Ex parte Crow Dog* (1883) 109 U. S. 556, 570; *Chew Heong* v. *United States* (1884) 112 U. S. 536, 549-550; *United States* v. *Langston* (1886) 118 U. S. 389, 393, 394.

to apply that standard to the facts and circumstances of each particular case. Nothing inconsistent with that conclusion can be found in the fact that, in enacting the Clayton Law, Congress saw fit expressly to describe and denounce therein certain particular practices which, if not so specified, probably would have been held, under most circumstances, to be "unfair methods of competition" within the Trade Law. That doubtless was a mere precautionary measure on the part of Congress to guard against the possibility that, under particular circumstances, the competitive methods covered by the Clayton Law might be regarded by the Trade Commission, or the courts, as not so "unfair" as to fall within the operation of the Trade Law. The plain intention of Congress was that the trade practices covered by the Clayton Law should be prevented at all events, and that all other trade practices, which the Trade Commission and the courts might find to be "unfair" in the sense indicated hereinabove,[92] should also be prevented. That is the fair interpretation of the Trade Law and the Clayton Law, considered together, and the words "unfair methods of competition," as used in the Trade Law, cannot properly be taken as narrowed in meaning by the Clayton Law.

§ 27. **Trade Law does not create a new wrong:** Construed as it is hereinabove suggested they should be, the words "unfair methods of competition in commerce" as used in the Trade Law, include little if anything more than the words "attempt to monopolize"[93] as used in

[92] Secs. 15-25, *supra*.

[93] "*An attempt to monopolize* means an attempt to get control of the industry in which the defendant is engaged '*by means which prevent other men from engaging in fair competition with him.*'" Morton J., in *United States* v. *Whiting* (1914) 212 Fed. 466, 478 (our italics). "To constitute the offense of monopolizing or *attempting to monopolize* under the act of Congress, it is necessary to acquire, or attempt

section two of the Sherman Law.[94] That such is the correct construction of the phrase "unfair methods of competition," appears persuasively from the provision in the Trade Law that nothing in the said law contained shall be "construed to alter, modify, or repeal"[95] the antitrust laws, including of course the Sherman Law. The words "alter" and "modify" are comprehensive. They would seem to be adequate to cover any substantive change whatsoever. And since the Trade Law, so far as it prescribes any rule of conduct in commerce, and the

to acquire, an exclusive right in such commerce *by means which will prevent others from engaging therein.* * * * Since the size of the business alone is not necessarily illegal, *it is the crushing of competition, by means of force, threats, intimidation, fraud, or artful and deceitful means and practices, which violates the law.* * * * The size of business, and the gaining of business popularity, fair dealing, sagacity, foresight, and honest business methods, even if it should result in acquiring the business of competitors, would not make an illegal monopoly. *It is the acquisition and use of unfair and illegal power in defeating competition which makes such illegal monopoly.*" Sheppard J., in *United States* v. *American Naval Stores Co.* (1909) 172 Fed. 455, 457-458, 459, affirmed in 186 Fed. 489, and reversed, but on another point, in 229 U. S. 373 (our italics). "It matters not whether the combination be 'in the form of a trust or otherwise', whether it be in the form of a trade association or a corporation, if it *arbitrarily uses its power to force weaker competitors out of business*, or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce, and monopolizes or *attempts to monopolize* a part of that commerce, in a sense that violates the anti-trust act." Lanning J., in *United States* v. *E. I. DuPont De Nemours Co.* (1911) 188 Fed. 127, 151, (our italics). "We next turn to *ruinous trade wars* against competitors which, as we have seen, was one of the features of *attempted monopoly* denounced by the Supreme Court." Buffington J., in *United States* v. *U. S. Steel Corporation* (1915) 223 Fed. 55, 77 (our italics). In *Standard Oil Co.* v. *United States* (1911) 221 U. S. 1, 61, Mr. Chief Justice White, referring to the second section of the Sherman Law, said: "Undoubtedly, the words 'to monopolize' and 'monopolize' as used in the section reach *every act* bringing about the prohibited results" (our italics). Cf., note 45, *supra.*

[94]See appendix.

[95]Trade Law, Sec. 11.

Sherman Law, are cognate statutes dealing with the same general subject matter, the declaration by Congress that the Trade Law shall not be construed to "alter" or "modify" the antitrust laws, would seem to preclude the possibility of giving effect to the Trade Law as materially adding to, or taking from, the substantive rules of competition in interstate and foreign commerce declared by the Sherman Law.

If any competitive trade practice whatsoever can be an "unfair method of competition" under the Trade Law, and not at the same time an unlawful "attempt to monopolize" under the Sherman Law, that result must arise from the possibility that whereas a monopolistic intent is indispensable to an actionable "attempt to monopolize,"[96] it may not be essential to an "unfair method of competition." Such a possible distinction between an "attempt to monopolize" and an "unfair method of competition" would appear, however, to be rather a matter of terms than of substance. It is hardly likely that a competitive method possessing the characteristics necessary to make it "unfair" under the Trade Law,[97] could be practised inadvertently without appreciating its nature and intending its consequences. The word "method" imports system, repetition, and excludes the idea of casual, occasional, haphazard conduct. Circumstances adequate to justify a ruling that any given competitive act was "unfair," and that it was so regularly or systematically performed as to constitute a "method" of competition, within the Trade Law, would no doubt suffice to raise the monopolistic intent essential to make the performance of such act an unlawful "attempt to monopolize" within the Sherman Law.

[96] *Swift & Co.* v. *United States* (1905) 196 U. S. 375, 396, 402.

[97] Secs. 15-25, *supra*.

§ 28. Trade Law creates merely a new remedy: In this aspect, the provisions of the Trade Law empowering the Trade Commission to institute proceedings to prevent "unfair methods of competition in commerce," appear merely to have created an additional remedy for a public wrong which, prior to the enactment of the Trade Law, had been denounced and made actionable.

Under the Sherman Law, an "attempt to monopolize" was punishable by fine or imprisonment, and a person injured in his business or property by such attempt could sue therefor and recover threefold damages, and costs including a reasonable attorney's fee. Also, under the Sherman Law, the government, through the Attorney General's department, could prevent and restrain an "attempt to monopolize" by a suit in equity. But, prior to the enactment of the Clayton Law,[98] nobody, other than the government, could obtain preventive relief against an "attempt to monopolize" merely as such.[99]

Now, under the Trade Law, there is another governmental agency in addition to the Attorney General's department, namely the Trade Commission, which by instituting the statutory proceedings[100] provided in the Trade Law to prevent "unfair methods of competition", may in effect obtain in the right of the public preventive relief against an "attempt to monopolize." The probability would seem to be, however, that the Trade Law will be so construed as to prevent private suitors from seeking to enjoin "unfair methods of competition," as such. That construction of the Trade Law would seem to be required by the same reasoning which led to the ruling that, under the Sherman Law, only the Attorney General's department may maintain a suit in equity

[98]See Clayton Law, Sec. 16.

[99]*Wilder Mfg. Co.* v. *Corn Products Co.* (1915) 236 U. S. 165, 174-175.

[100]Sec. 29, *infra.*

to enjoin an "attempt to monopolize." In addition, it is to be observed that while, as noted, the Clayton Law provides expressly that private suitors may have injunctive relief against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of the Clayton Law,[101] the enforcement of which is entrusted in part to the Trade Commission, the Trade Law does not contain any similar provision with reference to a violation of its inhibition against "unfair methods of competition." That omission in the Trade Law is perhaps likely to be held significant in construing the Trade Law. It is not however of much practical importance whether a private suitor may or may not maintain a suit to enjoin "unfair methods of competition" as such, if "unfair methods of competition" shall be held, as seems probable, not to include any act which is not at the same time an "attempt to monopolize" under the Sherman Law,[102] because if threatened with loss or damage as a result of an attempt to monopolize, section sixteen of the Clayton Law authorizes a private suitor to seek injunctive relief. But threatened loss or damage is essential to a private suitor's obtaining injunctive relief under the Clayton Law.[103]

§ 29. **Proceedings by Commission:** The Trade Law and the Clayton Law are substantially alike in their provisions[104] authorizing the Trade Commission to institute a proceeding to prevent "unfair methods of competition" under the Trade Law,[105] and violations of sections two, three, seven and eight of the Clayton Law.[106]

(1) *Complaint and notice.* The statutory proceeding is to be commenced by the Commission's issuing and

[101]Secs. 4, 9, 10, 11, 12, *supra.*

[102]Sec. 27, *supra.*

[103]*Union Pacific R. Co.* v. *Frank,* (1915) 226 Fed. 906, 911.

[104]See Trade Law, Sec. 5, Clayton Law, Sec. 11.

[105]Secs. 14-27, *supra.*

[106]Secs. 4, 9, 10, 11, 12, *supra.*

serving upon the person, partnership, association or corporation to be proceeded against, a complaint stating the charges of the Commission against the accused, and containing a notice of a hearing of the charges before the Commission at a specified place, and at a specified time at least thirty[107] days after the service of the complaint. The complaint is not to issue in any event unless the Commission "shall have reason to believe" that a violation of law has occurred.[108]

(2) *Service of complaint and notice.* The complaint and notice may be served by anyone duly authorized by the Commission, by delivering a copy thereof to the accused, or by leaving a copy at, or mailing by registered mail a copy to, the principal office or place of business of the accused. If the accused be a partnership, service may be made upon any partner, and if a corporation, upon the president, secretary, or other executive officer or director. A verified return by the person serving the complaint setting forth the manner of service, or in case

[107]The statutes require at least thirty days notice. Trade Law, Sec. 5; Clayton Law, Sec. 11. The Commission, by rule, has provided for at least forty days notice. See Rules of Practice, No. II, in appendix.

[108]It would seem doubtful at least whether the Trade Commission can be compelled by writ of mandamus to institute any proceeding. Mandamus will lie as against the Interstate Commerce Commission to compel it to exercise its regulative power. *Int. Com. Com.* v. *Humboldt S. S. Co.* (1912) 224 U. S. 474, 484. The Trade Commission, however, would seem to be put upon a different footing by the fact that no third person can invoke its regulative power as a matter of right, but the Commission itself must be the actor in proceedings under its regulative power (Sec. 29, (3) *infra*), and by the further fact that the Commission is not required to institute proceedings until and unless it "shall have reason to believe" that a violation of law has occurred. *Decatur* v. *Paulding* (1840) 39 U. S. (14 Pet.) 497, 514-516. Any attempt to coerce action by the Trade Commission could be defeated, it would seem, by the Commission's merely saying that it did not have "reason to believe."

of service by mail the registry return receipt, shall be sufficent proof of the service of the complaint.[109]

(3) *Commission the complainant.* There are not to be adversary parties litigant before the Commission, with the Commission sitting as an impartial arbiter to determine their respective rights and obligations. The law does not contemplate that any person supposing himself to be aggrieved by another's practising "unfair methods of competition" or violating section two, three, seven or eight of the Clayton Law, shall file with the Commission a complaint against such other person, and have his supposed grievance adjudged.[110] The Commission itself must be the complaining witness, in the first instance, in any proceeding before it. After the Commission shall have instituted a proceeding it may, upon good cause shown, permit another party than the one first accused to intervene therein, and to appear in person or by counsel.[111] Such intervenor may, of course, align himself against the person first accused, but even in such event, the proceedings before the Commission obviously cannot be regarded as a contest between private suitors.

(4) *No compulsory process.* The Commission is not authorized to issue any attachment, warrant, or other compulsory process to require the appearance before it of any person against whom it issues a complaint. The only thing in the nature of process which the Commission may issue to secure the appearance before it of the accused, is the notice of the time and place of hearing upon the complaint. The accused may appear or

[109]Cf., Rules of Practice, No. IV, in appendix.

[110]The Commission has, by rule, authorized an application in writing by any person to the Commission for the institution of proceedings by the Commission in respect of any violation of law over which the Commission has jurisdiction. See Rules of Practice, No. II, in appendix.

[111]Cf., Rules of Practice, No. V, in appendix.

not, as he shall see fit, but a failure to appear, if he should desire ever at any time to seek to make a defense, would be prejudicial.[112] If he shall appear at the hearing before the Commission, the statutes provide merely that "he may show cause why an order should not be entered by the Commission requiring" him to "cease and desist from the violation of law" charged against him in the complaint.[113]

(5) *No default.* If the accused shall not appear, the Commission cannot, it would seem, enter his default and take the complaint against him as confessed, because the statutes clearly contemplate that, in every proceeding whatsoever before the Commission, whether the accused shall appear or not, testimony shall be taken, reduced to writing, and preserved as well for the use of the accused, as for the use of the Commission, in possible subsequent court proceedings.

(6) *Report and order by Commission.* After a hearing upon any complaint shall have been had, the Commission, if of opinion that a violation of law has occurred as charged in the complaint, shall make a report in writing in which it shall state its findings upon the facts, and shall then issue and cause to be served upon the accused an order requiring him to cease and desist from the violation of law in question. The order of the Commission may be served in the same manner, above noted, as the complaint. The Commission may require the accused to cease and desist from violations of the Clayton Law

[112]Sec. 32, *infra.*

[113]The rules of the Commission provide for the filing of an answer by the accused, within thirty days after the service upon the accused of the Commission's complaint. See Rules of Practice, No. III, in appendix. The accused will not be heard orally in argument before the Commission, unless the Commission shall so order, but the accused may file a brief with the Commission at the close of the testimony. See Rules of Practice, No. X, in appendix.

"within the time fixed" by the order. There is no provision in the Trade Law which expressly authorizes the Commission to fix the time within which the accused shall cease and desist from practising an "unfair method of competition." The only order which the Commission may issue is one to "cease and desist." It cannot command affirmatively, or prescribe a rule of conduct for the accused in the future.[114] Its orders are not self-enforcing, and no penalty attaches for disobedience of its orders.[115] Neither the statutes, nor the Commission's rules of practice provide what shall become of a complaint if, after issuing it, the Commission shall decide not to prosecute it, or if after hearing the Commission shall be of opinion that no violation of law has occurred. Perhaps Congress intended that, in such contingencies, no order at all should be entered by the Commission, whether of dismissal of the complaint or otherwise, lest an order of dismissal, if entered, might be taken as permissive, or as a construction of the law by the Commission, and be distorted into a precedent.

(7) *Enforcing and overthrowing Commission's orders.* If a person accused shall fail to obey the Commission's order to "cease and desist," the Commission by itself cannot overcome such contumacy. It has no power or process to enforce its own orders, and to obtain enforcement thereof must apply to the United States Circuit Court of Appeals either in the circuit wherein the

[114]See Sec. 8, *supra*, and compare 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8583, (3), (4), pp. 3852-3854, conferring upon the Interstate Commerce Commission not only power to make orders to "cease and desist," but power to make various affirmative orders as well.

[115]Cf., 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8584, (6), (7), p. 3858, declaring it to be the duty of common carriers to obey the orders of the Interstate Commerce Commission made under its regulative power, and imposing a heavy penalty for disobedience of such orders.

violation of law against which the order is directed occurred, or in the circuit wherein the person against whom the order is issued resides or carries on business. With its application to the court, the Commission must file a certified transcript of the entire record of its proceedings, containing the complaint, all testimony taken, the report and findings of fact made by the Commission, and the order the enforcement of which is sought. The court is then required to notify the accused of the filing of the Commission's application for enforcement of its order and of the filing of the transcript, and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein, and may proceed, upon the transcript of the record of the proceedings before the Commission, to affirm, modify, or set aside the Commission's order.

If any person against whom an order to cease and desist shall have been entered by the Commission, shall not wish merely to ignore the order, as safely he may, and to await application by the Commission to the court for the enforcement thereof, such person may file in the proper court of appeals a written petition praying that the order of the Commission be set aside. A copy of such petition shall forthwith be served upon the Commission, and thereupon the Commission shall certify and file in the court a complete transcript of the entire record of its proceedings. Thereafter the court may proceed, upon the transcript of the record of the proceedings before the Commission, to affirm, modify, or set aside the Commission's order.

No order of the Commission, or judgment or decree of the court of appeals enforcing the Commission's order, shall in any way relieve any person proceeded against by the Commission from liability or prosecution under the antitrust laws.

(8) *Commission's control over its own orders.* Until a transcript of the record of a proceeding before the Commission shall have been filed in the proper court of appeals, the Commission may at any time, upon such notice to the accused and in such manner as the Commission may deem proper, modify, or set aside, in whole or in part, the report and order involved in such proceeding.

(9) *Court not bound absolutely by Commission's record.* The findings of the Commission as to the facts, if supported by testimony, are by the statutes made conclusive upon the circuit court of appeals.[116] The court, after acquiring jurisdiction, may however order additional evidence to be taken before the Commission, and adduced upon the hearing before the court, if either the Commission or the accused shall apply for leave therefor and shall show, to the satisfaction of the court, that such additional evidence is material and that there were reasonable grounds for failing to adduce the evidence before the Commission in the first instance. Such additional evidence may be taken upon such terms and conditions as to the court may seem proper. With the return to the court of such additional evidence, the Commission may make and file modified or new findings as to the facts, and its recommendations, if any, for the modification or setting aside of its original order. Such new or modified findings by the Commission as to the facts, if supported by testimony, shall be conclusive upon the court.

(10) *Jurisdiction of court of appeals exclusive.* Jurisdiction to enforce, set aside, or modify orders made by the Commission under its regulative power is vested

[116]See Sec. 33, *infra.*

exclusively in the circuit court of appeals,[117] and proceedings in that court to enforce, modify, or set aside the Commission's orders shall be given precedence over all other cases pending therein, and shall be in every way expedited. The judgment and decree of the court of appeals affirming, modifying, or setting aside any order of the Commission, shall be final, subject only to review by the Supreme Court of the United States upon certiorari.[118]

(11) *Procedural rules.* Under the power conferred upon it to make rules and regulations,[119] the Commission has adopted certain rules of practice[120] which supplement in some degree the procedural provisions of the statutes.

§ 30. Commission not a court: The statutory proceeding just reviewed, leading to a decree by a court of appeals, is the only proceeding which the Trade Commission is authorized to institute to prevent "unfair methods of competition in commerce", or a violation of section two, three, seven or eight of the Clayton Law. And it seems entirely clear from the nature of the statutory proceeding that the Commission, in thus discharging its regulative function, cannot properly be regarded as a

[117]In view of the fact that the court of appeals is given, in express terms, exclusive jurisdiction to enforce, set aside, or modify orders made by the Commission in the exercise of its regulative power (Trade Law, Sec. 5, Clayton Law, Sec. 11), the provision of the Trade Law (Sec. 9) that district courts of the United States shall have jurisdiction to issue "writs of mandamus commanding any person or corporation to comply with * * * any order of the Commission made in pursuance" of the Trade Law, is probably to be understood as applying only to orders made by the Commission otherwise than in the course of the exercise of its regulative power, that is, under its investigative power. Cf., Sec. 56, *infra*.

[118]The Judicial Code, Sec. 240; 1 U. S. Comp. Stat. (1913) Tit. 12C, Ch. 10, Sec. 1217, p. 511.

[119]Trade Law, Sec. 6 (g).

[120]See appendix.

court, or as exercising any judicial power whatsoever within the sense and meaning of the Constitution.[121]

The fact that the Commission cannot issue any coercive process to compel the appearance of the accused, or to enforce obedience to its orders, and the further fact that in proceedings before the Commission there shall not be adversary parties litigant, but the Commission itself shall be the actor in the first instance, completely differentiate the Commission from a court.

The Commission is not in any aspect an impartial adjudging body, as is a court. It is essentially an accusing body, so far as its regulative power is concerned. And it is fairly deducible from the provisions both of section five of the Trade Law and section eleven of the Clayton Law that Congress intended that the Commission, before instituting any proceeding, should investigate *ex parte,* and should measurably prejudge, the guilt of any suspect against whom the issuance of a complaint might be contemplated. That inference arises out of the fact that, by the terms of both statutes, the Trade Commission is not required to institute any proceeding unless it shall have "reason to believe" that a violation of law has occurred, and out of the further fact that both statutes evidently contemplate that such "reason to believe" shall be substantial, and not founded merely upon suspicion or vague report.

One consideration tending strongly to show the intention of Congress that the Trade Commission, before instituting any proceeding, should have a substantial "reason to believe", and not a mere suspicion, that a violation of law had occurred, is found in the circumstance that, as noted in the preceding section, the Commission apparently cannot take a complaint as confessed, or otherwise make any enforceable order without testimony

[121] *Gordon* v. *United States* (1864) 117 U. S. 697.

to support it. Both section five of the Trade Law and section eleven of the Clayton Law are explicit in providing for a "hearing" before the Commission, for the reduction to writing and filing of the "testimony" adduced before the Commission, and for the inclusion of such "testimony" in the transcript of the record of the Commission's proceedings filed in a court of appeals. The findings of the Commission, so far as supported by "testimony" are declared by the statutes to be conclusive on the court but, except as so supported, inferentially they amount to nothing. The orders of the Commission are not self-enforcing, and a court could not enter a valid decree to enforce them without some testimony to support the decree. Those considerations would seem to require that unless the Commission shall wish to incur the risk of having a proceeding instituted by it made farcical by the failure of the accused to appear, or having appeared to give evidence of his guilt, the Commission must be prepared in advance in every case to adduce testimony *prima facie* sufficient to sustain an order to cease and desist.

To the acquisition by the Commission of the substantial "reason to believe" which Congress thus appears to have intended the Commission should possess before instituting proceedings, it is obviously essential that the Commission, acting *ex parte* before issuing any complaint, should first investigate and ascertain with at least a degree of certainty the facts bearing upon the supposed violation of law, and should reach a conclusion at least tentatively that those facts constitute an offense and establish the guilt of the person to be accused.

The conclusion forced by the considerations noted that the Commission is not in any sense a court, cannot be regarded as weakened by the circumstance that the Commission is to conduct hearings, take testimony, make con-

clusive findings from the evidence taken as to the ultimate facts, and issue orders to cease and desist from "unfair methods of competition" and violations of sections two, three, seven and eight of the Clayton Law. Those acts do not amount to the exercise of judicial power, within the sense and meaning of the Constitution. The character of an inquiry by a governmental agency, as to whether it is executive, legislative, or judicial, is determined not by the conclusiveness, but by the nature, of the final act of the agency.[122] The final act of the Commission, in the exercise of its regulative power, is to be the issuance of an order to cease and desist, which, after all, amounts to nothing but a mere executive admonition or recommendation. It is not a judgment.[123] It is not conclusive upon the courts, as are the Commission's findings of facts, and cannot be enforced against the accused without the aid of the courts. The order of the Commission to cease and desist, if supported by a transcript of the record of the proceedings before the Commission, may be made a basis of conclusive action by a United States Circuit Court of Appeals. Until and unless acted upon approvingly and given force by the judicial power acting through an established and regularly constituted court, the order of the Commission is nugatory. The accused may disregard it with impunity. The Commission after having issued a complaint, is to act somewhat like a master in chancery in conducting a hearing, taking testimony, reaching conclusions as to the facts and reporting its conclusions to the court.[124] What the Commission is to do, in the exercise of its regulative powers, is not to ex-

[122] *Louis. & Nash. R. R. Co.* v. *Garrett* (1913) 231 U. S. 298, 307, 308; *Prentis* v. *Atlantic Coast Line* (1908) 211 U. S. 210, 227.

[123] *In re Sanborn* (1893) 148 U. S. 222, 226; *Gordon* v. *United States* (1864) 117 U. S. 697, 702.

[124] *Oregon R. R. & N. Co.* v. *Fairchild* (1912) 224 U. S. 510, 527.

ercise judicial power, but merely to perform certain acts preliminary to judicial action.

§ 31. **Jurisdiction of court of appeals original, not appellate:** Prior to the enactment of the Trade Law and the Clayton Law the jurisdiction of the United States circuit courts of appeals was exclusively appellate.[125] Conceivably it might be argued that section five of the Trade Law and section eleven of the Clayton Law authorize an appeal from the Trade Commission to a court of appeals. And in support of that contention, it might be urged that those sections provide for the same procedure which is usually adopted to remove a cause from a trial court to a reviewing court, that is, for a filing of a transcript of the record of the proceedings before the Commission in a court of appeals, and provide also in terms that the court may "affirm, set aside or modify" the Commission's orders upon the record.

In view, however, of the considerations noted in the preceding section, the Commission must be taken to be merely an administrative body, without any power of a judicial nature. Under the separation of governmental powers provided for in the Constitution, a court, the repository of judicial power, cannot lawfully be called upon to exercise executive or legislative power, whether by way of reviewing and enforcing the orders of an administrative body or otherwise.[126] To construe the Trade Law and the Clayton Law as requiring a court of appeals to exercise an appellate jurisdiction, as a reviewing court, in respect of the orders entered by the Commission as an administrative body would, therefore, be

[125] *United States* v. *Mayer* (1914) 235 U. S. 55, 65.

[126] *Hayburn's Case* (1792) 2 U. S. (2 Dall.) 408, 410-413; *United States* v. *Ferreira* (1851) 54 U. S. (13 How.) 40, 51-53; *Gordon* v. *United States* (1864) 117 U. S. 697, 702, 703; *In re Sanborn* (1893) 148 U. S. 222; *In re Pacific Ry. Com.* (1887) 32 Fed. 241, 254-259.

to raise doubtful constitutional questions as to those laws. And, so far as statutes may fairly be construed in such a way as to avoid doubtful constitutional questions, they should be so construed.[127]

The sound construction of section five of the Trade Law and section eleven of the Clayton Law would seem to be that they confer an original jurisdiction upon courts of appeals in addition to the appellate jurisdiction previously possessed. The proceedings authorized in the courts of appeals in respect of the Trade Commission's orders to "cease and desist" appear clearly to be a mere adaptation of the proceedings originally devised and authorized by Congress to enable the Interstate Commerce Commission to obtain the aid of federal trial courts to overcome by process for contempt of court any resistance to a lawful exercise of the Interstate Commerce Commission's investigative power. Such proceedings present a controversy for original judicial cognizance between the government, asserting a given right, and a citizen, denying that such right exists.[128]

A proceeding in a court of appeals under the Trade Law and the Clayton Law will be in effect an original proceeding between the government, represented by the Trade Commission, as plaintiff, and a citizen accused of an unlawful industrial practice, as defendant. The government will assert a right to have the citizen proceeded against compelled by the court to cease and desist from a given trade practice as constituting either an "unfair method of competition" or a violation of section two, three, seven or eight of the Clayton Law. The citizen will deny that the government has any such right in respect of the practice which may be in controversy. The

[127] *Fox* v. *Washington* (1915) 236 U. S. 273, 277.

[128] *Int. Com. Com.* v. *Brimson* (1894) 154 U. S. 447, 477, s. c. 155 U. S. 3.

court will determine the issue thus raised by reference to the laws of the United States and the ultimate facts which may be presented in the particular case, and in determining the issue will exercise a jurisdiction strictly original, and not in any sense appellate.

That view finds additional support in the provisions of section five of the Trade Law and section eleven of the Clayton Law which authorize a court of appeals, under the circumstances specified in those sections, to cause the Commission to take and return for the consideration of the court, evidence and findings in addition to those contained in the transcript of the record of the original proceedings before the Commission as first filed in the court. That circumstance, that the record as originally made up by the Commission and first filed in court, may subsequently be supplemented or modified by the introduction therein of new matter, would seem to exclude a conclusion that a court of appeals, in dealing with an order of the Commission to cease and desist, is to act strictly as a court of review and nothing else, confined to and bound by the record made before the Commission in the first instance.

§ 32. **Court of appeals not to proceed de novo:** From the fact that the jurisdiction of a United States Circuit Court of Appeals in respect of an order of the Trade Commission to cease and desist, is original and not appellate, it does not follow however that, when called upon to determine whether or not an order by the Commission shall be enforced, the court is to proceed and determine *de novo,* without regard to the proceedings before the Commission, whether or not a violation of law has occurred.

The intention of Congress appears to have been that in any proceeding instituted by the Commission, all the facts of the case shall be disclosed before the Commis-

sion and not withheld until the proceeding reaches a court.[129] That is clear from the fact that Congress has provided, both in section five of the Trade Law and in section eleven of the Clayton Law, that the "findings of the Commission as to the facts, if supported by testimony, shall be conclusive" upon the courts, and has restricted the right of a person accused to bring before a court defensive facts in addition to those introduced at the hearing before the Commission. Neither the Commission nor the accused may introduce new evidence before the court, in addition to that adduced before the Commission, unless it can be shown "to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission." And even when such additional evidence may be obtained at all, it must be taken before the Commission, and the Commission may, if it shall see fit, make findings as to the ultimate facts shown by such evidence, which findings also, so far as supported by testimony, shall be conclusive upon the courts.

The circumstance that the accused must present his whole case to the Commission, and the further circumstance that the Commission's findings as to the facts, if supported by testimony, are conclusive upon the courts, necessarily operate to limit to a degree the power which the courts otherwise might possess to deal with the question of the propriety of any order by the Commission as wholly *res integra* in any given case. There is not however, it would seem, anything in the Constitution to invalidate the requirement that the accused shall in gen-

[129] *Cin. N. O. & Tex. Pac. Ry.* v. *Int. Com. Com.* (1896) 162 U. S. 184, 196; *Tex. & Pac. Ry.* v. *Int. Com. Com.* (1896) 162 U. S. 197, 238-239; *M. K. & T. R. Co.* v. *Int. Com. Com.* (1908) 164 Fed. 645, 649.

eral, with the exception above noted, present at the hearing before the Commission all the defensive facts of which he ever expects to have any benefit.[130] And probably it was also competent for Congress, so far as the Constitution is concerned, to provide that the findings of the Commission upon the facts, if supported by testimony, shall be conclusive upon the courts in proceedings to enforce, or to vacate, the Commission's orders to cease and desist.[131]

§ 33. **Conclusiveness of Commission's findings:** The provisions of section five of the Trade Law and section eleven of the Clayton Law that the Commission's findings as to the facts shall be conclusive, are not to be understood as requiring the United States Circuit Court of Appeals, blindly and without question, to give effect to the Commission's orders at all events, or even to accept the Commission's findings upon the facts as unqualifiedly binding.

(1) *Legal effect of facts for court.* The legal effect of the Commission's findings of fact in any given case, and their sufficiency howsoever favorably viewed to constitute a violation of law and support the Commission's order to cease and desist, must, it would seem, always be a question for the courts.[132]

(2) *Fair hearing essential.* The findings of the Com-

[130] *Oregon R. R. & N. Co.* v. *Fairchild* (1912) 224 U. S. 510, 527; *Det. & Mackinac Ry.* v. *Mich. R. R. Comm.* (1914) 235 U. S. 402.

[131] *United States* v. *Ju Toy* (1905) 198 U. S. 253, 262-263; *United States* v. *Louis. & Nash. R. R.* (1914) 235 U. S. 314, 320-321; *Miller* v. *Mayor of New York* (1883) 109 U. S. 385, 393-394; *Johnson* v. *Towsley* (1871) 80 U. S. (13 Wall.) 72, 83-84; *Smelting Co.* v. *Kemp* (1881) 104 U. S. 636, 640; *Lewis* v. *Frick* (1914) 233 U. S. 291, 300; *United States* v. *Williams* (1912) 200 Fed. 538, 539.

[132] *Int. Com. Com.* v. *Louis. & Nash. R. R.* (1913) 227 U. S. 88, 92; *School of Magnetic Healing* v. *McAnnulty* (1902) 187 U. S. 94, 108-110; *Great Northern Ry.* v. *Minnesota* (1915) 238 U. S. 340, 345.

mission will not be given effect if it shall appear that the accused was denied a hearing, or that the hearing granted was inadequate, or manifestly unfair. And a fair hearing would seem at the least to require that the accused be informed of the facts charged against him and be given an opportunity to deny those facts and thereby to raise a definite issue to which the hearing may be confined; that he be apprised of the evidence submitted, or to be considered, against him, and be permitted to cross-examine witnesses and inspect documents; that he be given full opportunity to secure and present evidence in explanation or rebuttal of what may be urged against him, and that he be afforded the benefit of compulsory process, if necessary, to obtain his evidence; that he be permitted to be heard in argument to controvert the charge against him; and that what may be offered by the accused in his behalf be not merely listened to, but weighed and given due effect.[133]

Neither section five of the Trade Law nor section eleven of the Clayton Law provides in detail the manner in which hearings upon complaints issued by the Commission shall be conducted. Both sections do, however, provide that if the accused shall appear before the Commission, he shall have the right to "show cause why an order" to cease and desist should not be entered against him. If that provision should be given effect by the Commission as making its complaint in effect *prima facie* evidence of guilt and putting the burden upon the accused to establish his innocence, if at all, without first hearing the evidence against him, it might be open to doubt whether the requirements of a fair hearing would be met. But that probably is not reasonably to be anticipated.

[133] *Int. Com. Com.* v. *Louis. & Nash. R. R.* (1913) 227 U. S. 88, 91-93; *Oregon R. R. & N. Co.* v. *Fairchild* (1912) 224 U. S. 510, 524-525; *Louis. & Nash. R. R. Co.* v. *Finn* (1915) 235 U. S. 601, 608.

(3) *Testimony essential.* Even after the accused shall have had a fair hearing before the Commission, the Commission's findings as to the facts are not so conclusive upon the courts that the courts cannot go behind them or examine at all into the testimony adduced before the Commission. Both section five of the Trade Law and section eleven of the Clayton Law are explicit that the Commission's findings as to the facts are conclusive in any case only "if supported by testimony". Both sections require that all "testimony" in any proceeding before the Commission, "shall be reduced to writing and filed in the office of the Commission", and that the transcript of the record of any proceeding before the Commission filed in a court of appeals shall contain, among other things, "all the testimony taken". Both laws authorize a court of appeals "to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission".

Those provisions obviously contemplate that the Commission shall not in any case make any finding based upon its general information, or upon knowledge acquired by it in the regular discharge of its duties, or upon anything other than testimony actually taken and preserved in the particular proceeding in which the finding is made.[184] Those provisions also plainly authorize a court in every case to consider and decide whether or not there is any "testimony" at all in the transcript of the record of the Commission's proceedings to support the Commission's findings as to the facts. Probably a mere scintilla of proof will be held not enough, and a court will examine the testimony sufficiently to determine whether

[184] *Int. Com. Com.* v. *Louis. & Nash. R. R.* (1913) 227 U. S. 88, 93; *United States* v. *Louis. & Nash. R. R.* (1914) 235 U. S. 314, 321; *Whitfield* v. *Hanges* (1915) 222 Fed. 745, 753-755.

there was substantial evidence to support the Commission's finding.[135]

(4) *What is "testimony"?* The obligation which the Trade Law and the Clayton Law manifestly impose upon the courts to determine whether or not the findings of the Commission are "supported by testimony", necessarily imposes upon the courts the duty to decide as to what constitutes "testimony" in the sense in which that word is used in those statutes. Conceivably, it may be held that nothing is "testimony" in that sense, except what would be admissible in evidence under the strict rules of the common law. But that seems unlikely.[136] The Commission must, however, it would seem, observe in its proceedings the essential rules of evidence, which are of such character that their non-observance might prejudice the accused in making his defense or asserting his rights.[137] In so far as a court may be authorized to inquire and decide whether or not in any given case the Trade Commission has given due regard to the essential rules of evidence, to that extent the power of the court to go behind the findings of the Commission and to determine for itself the probative force of the testimony adduced before the Commission, will of course be increased.

(5) *Jurisdictional facts.* As to jurisdictional facts, upon the existence of which the power of the Commission

[135] *Int. Com. Com.* v. *Union Pacific R. R.* (1912) 222 U. S. 541, 547-548.

[136] *Int. Com. Com. v. Baird* (1904) 194 U. S. 25, 44; *Tang Tun* v. *Edsell* (1912) 223 U. S. 673, 677; *Low Wah Suey* v. *Backus* (1912) 225 U. S. 460, 471; *United States* v. *Uhl* (1914) 215 Fed. 573, 574, 576, reversed but upon another point, (1915) 239 U. S. 3; *Choy Gum* v. *Backus* (1915) 223 Fed. 487, 492-493; *Ex parte Chin Loy You* (1915) 223 Fed. 833, 835.

[137] *Int. Com. Com.* v. *Louis. & Nash. R. R.* (1913) 227 U. S. 88, 93; *Ex parte Chin Loy You* (1915) 223 Fed. 833, 839; Cf., Sec. 46, *infra*.

to enter any order at all in any given case may depend, the provisions of the Trade Law and the Clayton Law making the findings of the Commission conclusive, are likely to be held to be altogether without application. The question of the power of the Commission to exercise a regulative authority at all in any given case, is essentially a judicial question which the Constitution forbids should be withdrawn from the courts.[138] If the testimony bearing upon a jurisdictional fact shall be nicely balanced in any given case, a court will doubtless attach great weight to the Commission's finding as to that fact.[139] But it would seem that, whenever a finding of a jurisdictional fact is involved, a court may, if it shall see fit, consider not merely whether the Commission had substantial evidence to support such finding, but also the weight of the whole evidence, and may disregard the Commission's finding if regarded as against the weight of the evidence.

Thus, if the construction which hereinabove[140] has been placed upon the words "unfair methods of competition in commerce" as used in the Trade Law be correct, a finding by the Trade Commission that the effect of a given competitive practice is to suppress competition, unduly restrain trade, or create monopoly, will be a finding as to a jurisdictional fact, which will not be conclusive upon the courts. On the other hand, a finding by the Commission that the competitive practice in question is "unfair", if supported by testimony and made after a fair hearing, will probably be accepted by the court as binding upon it.[141] Likewise, if called upon to enforce an order of the Trade Commission requiring an accused

[138] *Int. Com. Com.* v. *I. C. R. R.* (1910) 215 U. S. 452, 470.

[139] *Int. Com. Com.* v. *Nor. Pac. Ry. Co.* (1910) 216 U. S. 538, 544.

[140] Secs. 14 to 27, *supra*.

[141] Cf., *United States* v. *Louis. & Nash. R. R.* (1914) 235 U. S. 314, 320-321.

person to cease and desist from a violation of section two, three, seven or eight of the Clayton Law,[142] a court will probably regard the finding of the Commission that the effect of the particular act in question may be to eliminate or substantially to lessen competition, to restrain trade, or to create monopoly, as a finding of a jurisdictional fact, in respect of which the court will consider itself at liberty to examine, and to reach its own conclusions upon, the testimony adduced before the Commission. As to any other facts, the courts will probably take the Commission's findings, if supported by testimony, as conclusive.

[142]Secs. 4, 9, 10, 11, 12, *supra*.

CHAPTER III.

ADVISORY POWER.

§ 34. **Scope of power:** In the exercise of its advisory power[143] the Trade Commission may make reports (1) to the President, to either House of Congress, or to the Attorney General, as to alleged violations of the antitrust laws; (2) to the Attorney General as to the manner in which decrees, entered at the suit of the United States to restrain violations of the antitrust laws, are being carried out; (3) to the courts as to appropriate decrees for complainant in suits by the United States under the antitrust laws; (4) to Congress as to trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions may affect the foreign trade of the United States; and (5) to Congress as to additional legislation. The Commission may also (6) report to the public at any time any information it may obtain, and may deem it expedient in the public interest to publish, except information as to trade secrets and the names of customers of persons or corporatons acquired by it in the discharge of its duties.

§ 35. **Violations of antitrust laws:** The Commission, upon the direction of the President or either House of Congress, is to report the facts relating to any alleged violation of the antitrust laws by any corporation.[144] Upon the application of the Attorney General, the Commission is to make recommendations for the readjust-

[143]Trade Law, Sec. 6, (c), (d), (e), (f), (h), Sec. 7; Sec. 5, *supra.*

[144]Trade Law, Sec. 6, (d).

ment of the business of any corporation alleged to be violating the antitrust laws in order that the corporation may thereafter conduct its affairs in accordance with law.[145]

While the Trade Law does not so declare explicitly, it is probably to be understood that the reports and recommendations thus provided for are to be made to the respective officers or bodies requesting them, that is to the President or either House of Congress in the one case, and to the Attorney General in the other. There is nothing in the Trade Law which suggests that Congress intended that, upon the application of the Attorney General, the Commission should make recommendations directly to the corporations involved as to how they might readjust the conduct of their business so as to make it conform with the antitrust laws. The reasonable supposition is that Congress intended that the Attorney General, and not the Commission, should be spokesman for the government in recommending readjustments to corporations accused of violating the antitrust laws. Considering the relative powers of the Attorney General and the Commission respectively, in respect of securing enforcement of the law, it is probable that recommendations voiced by the former will receive considerably more attention than those coming from the Commission. Moreover, an Attorney General can assure a corporation adopting recommendations offered, a degree of immunity from subsequent prosecution at least during that Attorney General's term of office. The Commission cannot furnish such assurance in any degree. It cannot declare authoritatively in advance whether any given line of conduct, if pursued by a corporation or anybody else, will be prosecuted or not.

The advisory power of the Commission in respect of

[145]Trade Law, Sec. 6, (e).

violations of the antitrust laws, relates exclusively to the conduct of corporations. It cannot affect natural persons. But that power does extend in terms to making reports and recommendations as to an alleged violation of the antitrust laws by "any corporation"[146] whatsoever, and therefore includes a bank or an interstate common carrier which, as well as any other corporation, might be a party to a combination or conspiracy in restraint of trade, or other violation of the antitrust laws.

The Trade Law, in one of its provisions,[147] distinguishes in terms between action by the Commission "upon its own initiative" and action "upon the application" of another governmental agency. In view of that circumstance, the terms of the grant of power to the Commission to make reports and recommendations in respect of alleged violations of the antitrust laws, are perhaps significant. By the terms of the Trade Law, the Commission is to make reports as to alleged violations of the antitrust laws "upon the direction"[148] of the President or either House of Congress, and recommendations so that the business of a corporation may be readjusted to conform with the antitrust laws "upon the application"[149] of the Attorney General. It may be held that a grant in such terms implies a condition that the power shall not be exercised at all, unless in the one case the President or either House of Congress shall first direct, or in the other the Attorney General shall first apply for, the exercise thereof.

That construction of the Trade Law would, of course, deny to the Commission any lawful initiative in setting about the preparation of any report, or the making of any recommendation, in connection with alleged violations of the antitrust laws, and deprive the Commission

[146]Trade Law, Sec. 6, (d), (e).
[147]Trade Law, Sec. 6, (c).
[148]Trade Law, Sec. 6, (d).
[149]Trade Law, Sec. 6, (e).

of all protection of the statute as to any report or recommendation it might make without previous request therefor from the proper officer or body. Congress may have intended to accomplish just that. The same considerations which led Congress generally to exclude banks and interstate common carriers from the operation of the powers of the Commission, may have contributed to induce Congress to withhold discretion and initiative from the Commission in this particular instance when the exercise of its powers might touch such corporations. And so far as concerns the making of recommendations to enable a corporation to readjust its business so as to conform with the antitrust laws, a ruling that the Commission has any discretionary authority or power of initiative in connection with that matter would obviously create a possibility, if not a risk, of a conflict between the Attorney General and the Commission. Congress probably did not intend that.

§ 36. **Enforcement of decrees**: In conferring power upon the Commission to make reports and recommendations to the Attorney General in respect of the manner in which decrees obtained by the government restraining corporations from violating the antitrust laws are being carried out,[150] the legislative purpose appears to have been twofold.

The Trade Law makes it the imperative duty of the Commisson to investigate and make such report and recommendation, upon the request of the Attorney General. One purpose of Congress appears, therefore, to have been that the Commission should, upon request of the Attorney General, assist him in ascertaining whether decrees enjoining violations of the antitrust laws are being complied with by corporations, and in securing their enforcement. But Congress appears to have intended

[150]Trade Law, Sec. 6, (c).

also, that if the Attorney General should be lax about securing compliance with any such decree, the Commission should correct that, not by interfering with the conduct of the Attorney General's office in seeking by direct action to obtain the enforcement of the decree, but by bringing the laxness of the Attorney General to public notice, and thereby affording the public an opportunity, if it should so desire, to apply in due course a political remedy. The intention of Congress thus to vest in the Commission an indirect coercive power over the Attorney General, appears from the fact that the Commission is expressly given not only power of initiative to make reports and recommendations to the Attorney General, in connection with the enforcement of decrees entered at the suit of the government to restrain violations of the antitrust laws, but also full discretionary power to make such reports and recommendations public.

The power of the Commission thus to make reports and recommendations does not extend to decrees against natural persons, but does extend in terms to a decree against "any defendant corporation".[151] That, of course, includes decrees against banks and interstate common carriers, as well as other corporations. The obvious difference in position between a bank or interstate common carrier against which a decree enjoining a violation of the antitrust laws has been entered, and a like corporation merely alleged to have been guilty of such violation, would seem to be sufficient to explain why Congress granted the Commission initiative and discretion in exercising its advisory power as to the one, and denied it, as was noted in the preceding section, as to the other.

§ 37. **Drafting decrees:**[152] By the terms of the Trade Law, the "form" of a decree for complainant is the matter in respect of which the Commission, as a master in

[151]Trade Law, Sec. 6, (c). [152]Trade Law, Sec. 7.

chancery, is to report to the court in suits in equity brought by the government under the antitrust laws. The "form" of decree in such suit, as in every other suit in equity in a federal court, is, however, prescribed by the equity rules.[153] The Trade Law is therefore probably to be understood as authorizing the Commission to report to the court what substantial terms and provisions would be appropriate in such decree.

The Commission is not authorized to act upon its own initiative in reporting a decree to the court. The court must first refer the suit to the Commission for that purpose, and the law does not authorize a reference until after all testimony shall have been concluded, and the court shall have formed an opinion that the government is entitled to a decree.

The Commission, in ascertaining what would be an appropriate decree in any suit which may be referred to it, shall proceed upon such notice to the parties to the suit, and under such rules of procedure, as the court may prescribe. The provision for notice doubtless implies that the parties shall be granted a hearing before the Commission as to what decree the Commission should recommend to the court. It is not, however, to be understood that such hearing may be for the purpose of enabling the Commission to determine for whom, whether complainant or defendant, a decree should be rendered, or that the parties may offer additional evidence before the Commission at such hearing. That possibility is probably excluded by the "due process" clause of the Fifth Amendment, the Commission not being a court,[154] and it is clearly excluded by the fact that, by the terms of the Trade Law, a reference of any suit to the Commission is not authorized until after the testimony there-

[153]Equity Rules of 1912, No. 71; [154]Sec. 30, *supra*.
226 U. S. 669-670.

in shall have been closed, and the court shall have concluded, upon that testimony, that the complainant is entitled to relief. What the Trade Law obviously contemplates is that, at the hearing before the Commission, the parties shall be heard in argument, upon the testimony taken prior to the reference, as to what, in view of such testimony, would be an appropriate decree for complainant.

After the Commission shall have reported to the court such decree for complainant as the Commission may consider would be appropriate, the parties may file exceptions to the Commission's report, and such proceedings may thereafter be had with reference thereto as with reference to the report of a master in chancery in any other suit in equity.[155] The court is not, however, bound to accept the report of the Commission in whole or in part. The court may reject the Commission's report altogether, and enter such decree as in the judgment of the court may be appropriate.

The framing of a proper decree to dissolve a combination or consolidation effected in violation of the antitrust laws is a laborious matter of exceeding complexity and difficulty.[156] The decrees entered in the *Standard Oil Company Case*[157] and in the *American Tobacco Company Case*,[158] respectively, have been criticized as not effectual to accomplish the purposes for which they were entered.[159] In making it one of the duties of the Commission to act in an advisory capacity to the courts in framing decrees for the complainant in suits by the government under the antitrust laws, the legislative purpose

[155] Equity Rules of 1912, No. 66; 226 U. S. 668.

[156] *United States* v. *American Tobacco Co.* (1911) 191 Fed. 371.

[157] *Standard Oil Co.* v. *United States* (1911) 221 U. S. 1.

[158] *United States* v. *American Tobacco Co.* (1911) 221 U. S. 106.

[159] 51 Cong. Rec. 9750 (bound vol. p. 8976); E. Dana Durand, in "The Trust Problem," 28 *Quart. Journ. Econ.*, 406-408.

appears to have been in part to lighten the labors of the courts, and in part to give the courts the benefit of the higher learning in economics, and superior wisdom in business affairs, which Congress appears to have expected that the members of the Commission either would possess when appointed, or would gradually acquire by experience in the course of the discharge of their official duties.[160]

§ 38. **Foreign trade:** In granting authority to the Commission to make reports and recommendations for legislation in respect of trade conditions in and with foreign countries where combinations or practices of manufacturers or traders, or other conditions, may affect the foreign trade of the United States,[161] Congress appears to have had in view the possible desirability of amending the antitrust laws so as clearly to exempt combinations of exporters of goods from the United States from the operation thereof.

As was pointed out during the debates in Congress[162] upon the Trade Law, "cartels" or combinations of manufacturers and traders are expressly sanctioned by some foreign governments, and tolerated by others. That enables foreign competitors of United States producers and foreign purchasers of exports from the United States, to eliminate competition among themselves and act unitedly, and thereby seriously to affect, if not ab-

[160]51 Cong. Rec. 12129 (bound vol. p. 11083), 12455 (bound vol. p. 11236). The District Court for the Western District of New York (Hazel J.) and the District Court for the Eastern District of Pennsylvania (Buffington, Hunt and McPherson, JJ.) have declined the request of the government that the Trade Commission be permitted to assist those courts in framing decrees in favor of the government in cases arising under the antitrust laws. *United States* v. *Eastman Kodak Co.* (1915) 226 Fed. 62, 80-81; *United States* v. *Reading Co.* (1915) 226 Fed. 229, 285.

[161]Trade Law, Sec. 6, (h).

[162]51 Cong. Rec. 9987 (bound vol. p. 8851), 12129-12130 (bound vol. pp. 11083-11084).

solutely to control, the foreign markets and foreign prices for American products. There has been a difference of opinion among Attorneys General as to whether or not the inhibition of the Sherman Law against contracts, combinations, and conspiracies in restraint of interstate and foreign trade and commerce, forbids exporters of commodities from the United States to combine and eliminate competition among themselves in order successfully to cope with the combination of foreigners.[163] That uncertainty has led American producers either to be reluctant to enter into foreign trade at all, or having entered to act independently as competitors, bidding against each other and cutting their prices in order to dispose of their products abroad. That has operated, as of course, much to the advantage of the foreigners.

Those conditions in foreign trade Congress appears to have intended the Trade Commission should investigate fully and report upon, with recommendations for appropriate legislation to meet whatsoever evils may be found to exist.

§ 39. Additional legislation: The grant of authority to the Commission to make annual and special reports to Congress with recommendations for "additional legislation",[164] is probably to be understood as meaning additional legislation touching the same matters as those affected by the Trade Law and the antitrust laws. Those matters are, of course, most comprehensive. They would seem to include all activities in interstate and foreign commerce, except perhaps such activities of banks

[163]51 Cong. Rec. 12129-12130 (bound vol. pp. 11083-11084). *Semble*, the Sherman Law does forbid combinations of exporters which have the effect of monopolizing or restricting foreign trade. *United States* v. *U. S. Steel Corporation* (1915) 223 Fed. 55, 97-114.

[164]Trade Law, Sec. 6, (f).

and interstate common carriers as lie clearly outside the field of the antitrust laws.

To illustrate, under its advisory power in respect of additional legislation, the Commission may perhaps be expected to recommend from time to time that certain unfair competitive trade practices, in addition to those now covered by the Clayton Law, be specifically described and forbidden by statute. Also, the Commission may perhaps make recommendations as to the much discussed advisability of Congress enacting a general incorporation law and requiring all corporations engaged in interstate or foreign commerce to operate under a federal charter.[165] Again, there are numerous classes of persons desirous of being exempted from the operation of the inhibition found in the antitrust laws against combinations and conspiracies in restraint of trade. Labor unions and agricultural organizations have gained such exemption.[166] Like exemption has been urged upon Congress as necessary for organizations of retailers, to enable them to maintain themselves in competition with chain stores and department stores; for specialty producing manufacturers, to enable them to make exclusive trade agreements so that consumers of their products in all sections of the country may be assured of equal treatment; for users of waterpower, to enable them to induce capitalists to make the investment necessary to the development and utilization of the waterpower of the country; and for producers of coal and lumber, to enable them to avoid competition, operate economically, and conserve the forests and coal deposits yet remaining.[167] The Commission may perhaps be expected to make recommendations to Congress as to

[165]51 Cong. Rec. 9988 (bound vol. p. 8851).

[166]Clayton Law, Sec. 6.

[167]51 Cong. Rec. 9987 (bound vol. pp. 8850-8851).

whether or not those classes of persons, and others, should be granted the exemptions which they seek, and generally to study, and to report to Congress upon, the relative efficiency and desirability of big business and little business, of co-operation, combination, and competition, and other economic questions of like character.[168]

§ 40. Publicity: In providing that the Commission might publish its reports and decisions, and might report to the public from time to time such information obtained by it as it might deem expedient in the public interest, except trade secrets and the names of customers as to which it might obtain information in the discharge of its duties,[169] Congress appears to have proceeded upon the view that the establishment of a governmental agency for publicity is an efficient method to check the growth of monopoly.[170]

[168]51 Cong. Rec. 9989 (bound vol. p. 8852).

[169]Trade Law, Sec. 6, (f).

[170]51 Cong. Rec. 9608 (bound vol. p. 8843).

CHAPTER IV.

INVESTIGATIVE POWER.

§ 41. **Scope of power:** The investigative power of the Trade Commission is comprehensive.[171] It is not, however, without limitations. Its exercise is limited to the ends for which it was granted.[172] Also, the Trade Law provides several different methods whereby the Commission may investigate, and the persons whom the Commission's investigative power may affect, and the matters which it may touch, vary somewhat, depending upon the method of the exercise of the power.[173] The power is further limited in its exercise by the inhibition of the Fourth Amendment against unreasonable searches and seizures, and by the provision of the Fifth Amendment that no person may be compelled to incriminate himself, or be deprived of liberty or property without due process of law.[174]

§ 42. **As limited by purpose of grant:** The Trade Commission's investigative power cannot reasonably be regarded as other than merely complementary of its other powers. There is nothing in the Trade Law to indicate that Congress intended that the Commission should make investigation an end in and of itself, or that it should investigate at all except in furtherance of the legitimate exercise of its regulative and advisory powers.

Regulative and advisory powers[175] were conferred

[171]Trade Law, Secs. 3, 6, 8 to 10; Sec. 6, *supra;* Sec. 48, *infra.*

[172]Sec. 42, *infra.*

[173]Secs. 43 to 47, *infra.*

[174]Secs. 48 to 51, *infra.*

[175]Secs. 4 and 5, and Chapter II, and Chapter III, *supra.*

upon the Commission to the end, (1) that the Commission itself might institute and conduct the statutory proceeding prescribed in the Trade Law and in the Clayton Law to prevent "unfair methods of competition in commerce," and violations of sections two, three, seven and eight of the Clayton Law; (2) that the Commission might furnish information to the President and to the Attorney General bearing upon alleged violations of the antitrust laws and upon the enforcement of decrees restraining violations of those laws, for the purpose apparently of enabling the President and Attorney General, respectively, the better to exact obedience to those laws on the part of corporations, and perhaps of supplying the President a basis for recommendations by him to Congress for additional legislation; (3) that the Commission might furnish information to Congress to enable it to enact remedial legislation in respect of foreign trade and the matters affected by the antitrust laws and the Trade Law; and (4) that the Commission might furnish to the public such information, except as to trade secrets and names of customers, as it might acquire in the discharge of its duties and might deem it expedient in the public interest to publish.

The authority granted to the Commission to furnish information to the public does not, however, empower the Commission even by implication to obtain information as to any particular matter. The Commission is merely to give to the public so much as the Commission may see fit of such information as it may obtain relating to matters as to which, apart from its authority to report to the public, it is authorized to acquire information. The three primary ends, first above stated, of the grant of regulative and advisory powers to the Commission, are therefore to be taken as marking the limits within which the Commission must exercise its investigative power. Every

exercise by the Commission of its investigative power, in order to be lawful, must be confined to developing facts the ascertainment of which will tend to assist the Commission in accomplishing one or more of the three primary ends for which it received regulative and advisory powers. It will always be open to any person called upon by the Commission to furnish information to refuse it, if he can show that the information sought does not relate to the particular matter under investigation, or to any matter which the Commission is entitled under the Trade Law or Clayton Law to investigate.[176] Even with that limitation, however, the investigative power of the Commission is probably to be regarded as quite comprehensive,[177] particularly since apparently it is not essential that the information which the Commission may seek, in any given instance should, in every particular, bear directly and immediately upon the advisory or regulative end for which it may be sought, but it is enough that the bearing of such information upon such end should be appreciable although remote.[178]

§ 43. **As limited by method of exercise:** In addition to the general limitation upon the Commission's investigative power noted in the preceding section, the power appears to be subject to certain special limitations depending upon the method by which it may be sought to be exercised. The Trade Law provides four methods whereby the Commission may exercise its investigative power.[179] Those methods are (1) by requiring a report from any corporation, except a bank or an interstate common carrier; (2) by examining and copying any

[176] *Int. Com. Com.* v. *Brimson* (1894) 154 U. S. 447, 479, s. c. 155 U. S. 3.

[177] See, however, Sec. 48, *infra*.

[178] *Int. Com. Com.* v. *Goodrich Transit Co.* (1912) 224 U. S. 194, 215.

[179] Trade Law, Secs. 6 (b), 8, 9; Secs. 44 to 47, *infra*.

documentary evidence of any corporation being investigated or proceeded against; (3) by requiring by subpœna the attendance and testimony of witnesses, and the production of any documentary evidence relating to any matter under investigation, and by taking depositions in any proceeding or investigation; and (4) by obtaining information from other departments of the government. The employment of one of the four investigative methods thus provided does not necessarily exclude the use of any of the others in the same investigation. Circumstances may exist whereunder all four methods may be used together. But the matters in respect of which the Commission may inquire, and the sources from which it may obtain information, are different in some particulars under each of the different investigative methods.

§ 44. Requiring reports:[180] The general grant of investigative power in the Trade Law[181] starts with an enumeration of certain particular matters in respect of which the Commission is expressly authorized to investigate all corporations, except banks and interstate common carriers, which, for the most part, are not subject to the jurisdiction of the Commission. That enumeration might perhaps be construed as depriving the Commission of power to investigate any corporation as to any matter not specially enumerated, and hence as a general limitation upon the Commission's investigative power.

As against that view, however, it is to be observed that the Trade Law apparently contemplates that all corporations, including even banks and interstate com-

[180] Cf. Trade Law, Sec. 6, and 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8592, p. 3872, authorizing the Interstate Commerce Commission to require interstate common carriers to make reports to it.

[181] Trade Law, Sec. 6, (a).

mon carriers,[182] shall be subject to investigation by the Commission in some manner in respect of certain particular matters, as, for instance, alleged violations of the antitrust laws, which are not mentioned in express terms in the specific enumeration of matters for investigation contained in the clause of general grant of investigative power. Further, in the same connection, it is to be noted that the same subjects for investigation which are enumerated in the clause of general grant of investigative power, are also enumerated in that clause of the Trade Law[183] which authorizes the Commission to require the filing of reports by corporations, and that banks and interstate common carriers are excepted in the clause conferring authority upon the Commission to require corporations to file reports as well as in the clause of general grant of investigative power to the Commission. Those circumstances suggest that whatsoever implied limitation upon the Commission's investigative power may properly be deduced from the enumeration, in the general grant of investigative power, of certain special subjects for investigation, should perhaps be confined to investigations conducted by the Commission's requiring corporations, other than banks and interstate common carriers, to file reports with it.

In this view, every exercise of investigative power by the Commission's compelling a corporation subject to the requirement to file a report, must be restricted not only to obtaining facts bearing upon a matter lying within the Commission's advisory or regulative powers,[184] but in addition must be confined to inquiries as to the corporation's "organization, business, conduct, practices, and management," and "its relation" to other corpo-

[182]Secs. 35 and 36, *supra*.
[183]Trade Law, Sec. 6, (b).
[184]Sec. 42, *supra*.

rations, and to individuals, associations, and partnerships, those being the subjects for investigation specially enumerated in the clauses of the Trade Law under consideration.[185]

The power of the Commission to investigate by requiring the filing of reports, is limited further in that the terms of the Trade Law do not purport to make that method of investigation applicable to natural persons, any more than to banks or interstate common carriers.

The Commission is given wide discretion in respect of reports.[186] Thus the Commission may from time to time classify such corporations as are bound to render reports, and may require any class, or any one of any class, of such corporations to report, without making a like requirement of others. It may require annual reports, or special reports, or both. It may require reports either by general orders, or by special orders. It may determine what questions shall be propounded to the corporations, what shall be the form of the reports, whether the reports shall be under oath or otherwise, when the reports shall be filed, and generally may make rules and regulations for the purpose of carrying out the provisions of the Trade Law relating to the filing of reports.

It is perhaps not unlikely that this grant of discretionary authority to the Commission may be attacked as a delegation of legislative power repugnant to the Constitution. But the line which separates exactly the exercise of legislative and administrative power is not easy to define,[187] and the success of such attacks, if made, would appear doubtful, to say the least.[188]

[185]Trade Law, Sec. 6, (a), (b).
[186]Trade Law, Sec. 6, (b), (g).
[187]*Mutual Film Corp.* v. *Ohio Indus'l Comm.* (1915) 236 U. S. 230, 245.
[188]*Buttfield* v. *Stranahan* (1904)

§ 45. Examining and copying documents:[189] The Commission's power to investigate by means of examining and copying documents is limited, by the terms of the Trade Law, to "any documentary evidence of any corporation being investigated or proceeded against."[190] The phrase "documentary evidence" may perhaps be narrowly construed so as to exclude, for instance, the corporate records of a corporation.[191] And, in order to be subject to being examined and copied, the documentary evidence must, it would seem, bear upon some matter in respect of which the Commission is charged with a regulative or advisory function.[192]

Examining and copying documents, as a method of investigation, is restricted to the documentary evidence of corporations. The Trade Law does not purport to extend that method of investigation to the papers of natural persons. And it is only when a corporation is "being investigated or proceeded against," that its documentary evidence may be examined and copied by the Commission. The Trade Law, however, authorizes the examination of the documents of "any corporation," if the corporation is "being investigated or proceeded against." That would seem to include banks and interstate common carriers, as well as other corporations.

It would seem that the Commission, acting upon its

192 U. S. 470, 496; *St. L. I. M. & S. R. R.* v. *Taylor* (1908) 210 U. S. 281, 287; *United States* v. *Grimaud* (1911) 220 U. S. 506, 516.

[189]Cf. Trade Law, Sec. 9, and 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8592, (5), p. 3873, and Sec. 8591, (8), p. 3869, giving the Interstate Commerce Commission access to the accounts and records of interstate common carriers.

[190]The phrase "documentary evidence" as used in the Trade Law "means all documents, papers, and correspondence in existence at and after the passage" of the Trade Law on September 26, 1914. Trade Law, Sec. 4.

[191]*United States* v. *Louis. & Nash. R. R.* (1915) 236 U. S. 318, 334.

[192]Sec. 42, *supra*.

own initiative, possesses at least very wide, and probably practically unlimited, discretionary power to place any corporation, except a bank or an interstate common carrier, in the position of "being investigated or proceeded against," and thereby to create such a situation as would authorize examining and copying the corporation's documentary evidence bearing upon the matter involved in the investigation or proceeding. That can be accomplished as to any corporation, except a bank or an interstate common carrier, by the Commission's instituting a proceeding against the corporation under the Commission's regulative power to prevent unfair methods of competition in commerce and violations of sections two, three, seven and eight of the Clayton Law.

The only possible limitations upon the Commission's discretionary power in that regard would seem to be that, before instituting the proceeding under either the Trade Law or the Clayton Law, the Commission shall have "reason to believe" that there has been a violation of law on the part of the corporation to be proceeded against, and that in addition, before instituting a proceeding under the Trade Law, it "shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public."[193]

For a corporation being proceeded against to seek to invoke the aid of a court to prevent the Commission's examining and copying documentary evidence, on the ground that the Commission had omitted, before instituting the proceeding, to acquire "reason to believe" that a violation of law had occurred, and to reach a conclusion that the "interest of the public" required the institution of the proceeding, would in effect draw the good faith of the Commission into question. Whether a

[193]Trade Law, Sec. 5, Clayton Law, Sec. 11.

court would entertain such a question at all is, to say the least, open to serious doubt. But, if a court would hear the question at all, the difficulty of the corporation's proving affirmatively that the Commission had acted in bad faith in instituting the proceeding would, in the nature of things, be practically insuperable.

As to banks and interstate common carriers, however, the situation would seem to be otherwise. The regulative power of the Commission does not extend to authorizing the institution of any proceeding against a bank or interstate common carrier. And while banks and interstate common carriers may be put in the position of "being investigated" by the Commission, the initiative in accomplishing that result apparently does not, with one exception, lie with the Commission.[194] That exception, when a bank or an interstate common carrier may be subjected to "being investigated" by the Commission upon the Commission's own independent initiative, is when a final decree has been entered against such corporation at the suit of the government to prevent and restrain any violation of the antitrust laws. In such case the Commission may proceed upon its own initiative, and upon the application of the Attorney General is bound to proceed, to make investigation of the manner in which such decree has been, or is being, carried out. A bank or interstate common carrier involved in such investigation would seem to be in the position of "being investigated," in such sense as to subject its documentary evidence to being examined and copied by the Commission.

Under the only other circumstances which may subject a bank or an interstate common carrier to "being investigated" by the Commission, the Commission cannot act upon its own initiative in instituting the investigation.

[194]Secs. 35, 36, *supra*.

Those circumstances are (1) when a bank or an interstate common carrier is alleged to be violating the antitrust laws, and the President, or either House of Congress, directs the Commission to investigate and report the facts with reference to such alleged violation; and (2) when such corporation is alleged to be violating the antitrust laws, and the Attorney General applies to the Commission to investigate and make recommendations for the readjustment of the business of such corporation to conform with the antitrust laws. Under those circumstances, the initiative in putting a bank or interstate common carrier in the position of "being investigated" by the Commission, would seem to be lodged in the one case in the President or either House of Congress, and in the other in the Attorney General, the Commission apparently being, as noted elsewhere,[195] without power to investigate, report or make recommendations in connection with mere alleged violations of the antitrust laws by any corporation, except as and when first specially requested so to do by the governmental authorities named in the Trade Law.

§ 46. **Examining witnesses:**[196] In addition to the general limitation that the evidence sought must have a bearing upon some matter lying within the scope of the Commission's advisory or regulative powers,[197] the principal special limitation upon the Commission's exercising its investigative power by examining witnesses, taking depositions, and requiring the production of documentary evidence by subpœna, would seem to be that there must first be a "matter under investigation" or a "proceeding or investigation pending" before the Commission

[195]Sec. 35, *supra*.

[196]Cf. Trade Law, Sec. 9, and 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8576, pp. 3842-3844, giving the Interstate Commerce Commission power to examine witnesses.

[197]Sec. 42, *supra*.

under the Trade Law, in respect of which testimony may be taken.[198]. A state of affairs presenting a "matter under investigation" or a "proceeding or investigation pending," can of course be created by the Commission of its own motion at any time as to any matter within the regulative or advisory powers of the Commission, under the Trade Law, except alleged violations of the antitrust laws by corporations, in respect of which the power to initiate investigations to be conducted by the Commission is vested, as noted elsewhere,[199] in the President, or in either House of Congress, or in the Attorney General. When exercising its investigative power by subpœnaing and examining witnesses and documentary evidence, the Commission may, of course, subject natural persons as well as corporations to the investigative process.

To the efficient use of a subpœna to obtain documents, a degree of foreknowledge as to the identity, nature and contents of the documents, and as to who has the custody of them, is essential.[200] For that reason, the obtaining of documentary evidence by subpœna must be regarded as a relatively restricted method of obtaining information, as compared with examining and copying the documentary evidence of a corporation under the investigative method considered in the preceding section.

While, as noted elsewhere,[201] in conducting proceedings under its regulative power to prevent unfair methods of competition in commerce and violations of the Clayton Law, the Commission must regard the essential rules of evidence the non-observance of which might

[198]Trade Law, Sec. 9.

[199]Sec. 35, *supra*.

[200]*Murray* v. *Louisiana* (1896) 163 U. S. 101, 107; *Hale* v. *Henkel* (1906) 201 U. S. 48, 77; *Dancel* v. *Machinery Co.* (1904) 128 Fed. 753, 761-762. Cf. Rules of Practice, No. VII, in appendix.

[201]Sec. 33 (4) *supra*.

prejudice the rights of the person or corporation being proceeded against, the Commission apparently possesses greater freedom of action when investigating in furtherance of the exercise of its advisory power to obtain information to enable it to make reports and recommendations for the enlightenment of the legislative or executive branches of the government in connection with enacting new, or enforcing existing legislation.[202]

Any member of the Trade Commission may sign subpœnas, and the subpœnas may require the attendance of witnesses, and the production of documentary evidence, from any place in the United States at any designated place of hearing.[203] Any Commissioner, and any of the Commission's examiners, may administer oaths and affirmations, examine witnesses, and receive evidence. The Commission may order testimony taken by deposition[204] in any proceeding or investigation pending before it, before any person who may have power to administer oaths and may be designated by the Commission. A deposition shall be reduced to writing by, or under the direction of, the person before whom the testimony is taken, and shall be subscribed by the deponent. Any person may be compelled to testify, and produce documentary evidence by deposition, in the same manner as witnesses may be compelled to appear in person, testify, and produce documentary evidence before the Commission. Witnesses summoned before the Commission are to receive the same fees and mileage as are paid to witnesses in the federal courts. Witnesses

[202] *United States* v. *Armour & Co.* (1906) 142 Fed. 808, 826.

[203] See Rules of Practice, No. VII, in appendix.

[204] Witnesses are to be examined orally, unless for "good and exceptional cause" the Commission shall permit their testimony to be taken by deposition. See Rules of Practice, No. VII, in appendix. As to the manner of taking and returning depositions, see Rules of Practice, No. VIII, in appendix.

whose depositions are taken, and the persons before whom the depositions are taken, are to receive the same fees respectively as are paid for like services in the federal courts.

§ 47. Obtaining information from other departments: The power of the Commission to exact records, papers, and information from other departments and bureaus of the government, is limited by the provision that the President must first direct such other bureau or department to comply with the Commission's request for information, and that the only records, papers and information which the Commission is authorized to request are those relating to corporations subject to the provisions of the Trade Law.[205]

§ 48. Narrow construction possible: Having regard for the Constitution, it is at least open to doubt whether the investigative power of the Commission can be given operation and effect, especially as to natural persons, to the full limits to which the Trade Law in terms apparently purports to extend that power.

Whether Congress itself has unlimited power to investigate the private affairs of natural persons for the purpose of acquiring information to assist it in enacting additional legislation, and whether Congress can delegate such power, if it possesses it at all, to an administrative body, are constitutional questions which the Supreme Court of the United States has recognized as of grave difficulty, but has expressly left open.[206] The same doubt would seem to exist as to the power of Congress or of the President, or both together, to require, or to authorize an administrative body to require, nat-

[205] Trade Law, Sec. 8. Cf., 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8602, p. 3888, relating to Interstate Commerce Commission.

[206] *Harriman* v. *Int. Com. Com.* (1908) 211 U. S. 407, 417-418.

ural persons to disclose their private affairs for the purpose of enabling a discovery as to whether the antitrust laws have been violated, or of facilitating the enforcement of such laws.

Notwithstanding the broad investigative power which the Trade Law purports to confer upon the Trade Commission, it may perhaps be held that the only matters in respect of which the Trade Commission can compel natural persons to furnish evidence relating to their private affairs, are such matters as may be made the subject of a complaint, and an investigation in form judicial, before the Commission,[207] that is, violations of the inhibition of the Trade Law against unfair methods of competition in commerce, and violations of sections two, three, seven and eight of the Clayton Law.

§ 49. **Self-incrimination:** Even as to matters with reference to which the Commission may lawfully require natural persons to disclose their private affairs in any degree, the investigative power of the Commission is further limited by the protection against self-incrimination guaranteed to natural persons by the Fifth Amendment. That protection does not extend to corporations,[208] nor does it extend to natural persons in respect of the documentary evidence of corporations, but only as to the natural person's own private papers.[209]

§ 50. **Immunity clause:** With a view doubtless to disentitling a natural person to refuse to furnish information to the Commission on the ground that such information might incriminate him, Congress inserted in

[207] *Harriman* v. *Int. Com. Com.* (1908) 211 U. S. 407, 419-420, 421; *United States* v. *Skinner* (1914) 218 Fed. 870, 872.

[208] *Hale* v. *Henkel* (1906) 201 U. S. 43, 74-75.

[209] *Wilson* v. *United States* (1911) 221 U. S. 361, 379-386; *Dreier* v. *United States* (1911) 221 U. S. 394, 399-400; *Wheeler* v. *United States* (1913) 226 U. S. 478, 488-490.

the Trade Law a clause which declares that no person shall be excused from testifying or producing evidence before the Commission, or in obedience to the subpœna of the Commission, on the ground that such evidence may tend to incriminate him, but that no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the Commission in obedience to a subpœna issued by it.[210]

A natural person, within the operation of an immunity clause enacted by Congress, may be compelled to furnish evidence notwithstanding the tendency thereof may be to incriminate him, if the protection against prosecution afforded by the immunity clause is as broad as that contained in the Fifth Amendment.[211] But otherwise not.[212] An immunity clause may, it seems, operate to protect a witness from prosecution in respect of documentary evidence of a corporation which he may produce, as well as in respect of his own private papers,[213] although, as noted,[214] the protection against self-incrimination guaranteed by the Fifth Amendment does not extend to the production by a natural person of a corporation's documentary evidence.

Whether because of a desire to prevent persons from acquiring immunity from prosecution by obtruding testimony upon the Commission, or to safeguard the Commission against conferring immunity inadvertently, or

[210]Trade Law, Sec. 9. Cf., 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Secs. 8577, 8578, pp. 3846, 3847, relating to the immunity of a witness from prosecution in connection with matters testified to before the Interstate Commerce Commission.

[211]*Brown* v. *Walker* (1896) 161 U. S. 591.

[212]*Counselman* v. *Hitchcock* (1892) 142 U. S. 547.

[213]*Hale* v. *Henkel* (1906) 201 U. S. 43, 73.

[214]Sec. 49, *supra*.

for some other reason, Congress so drafted the immunity clause in the Trade Law as apparently to make the issuance and service of a subpœna a prerequisite of protection from prosecution as to any matter concerning which a witness may furnish evidence to the Commission. In thus making a subpœna essential to protection, and also perhaps in other particulars, the immunity clause of the Trade Law differs from some other statutory provisions of like nature which have been held to afford protection from prosecution as broad as that guaranteed by the Fifth Amendment.[215] In addition to refusing to furnish self-incriminating evidence unless and until he shall have been first duly served with a proper subpœna, prudence plainly requires that before answering any self-incriminating interrogatory which may be propounded to him, or producing any self-incriminating documentary evidence, before the Commission, a natural person, wishing to avail himself of the protection of the immunity clause in the Trade Law, should also take other precautions. Before furnishing any self-incriminating evidence, the witness should make certain that such evidence is within the scope of the subpœna served upon him, and that it relates to a matter concerning which the Commission has clear power to compel the giving of testimony and the production of documents. And in estimating the coercive authority of the Commision in respect of obtaining evidence, the witness should take the narrow view of the Commission's investigative power suggested in a preceding section.[216] Also, before furnish-

[215] *United States* v. *Armour & Co.* (1906) 142 Fed. 808, 819, 822-825. Cf., however, 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8580, pp. 3848-3849, which seems to make a subpoena essential to protection under all of the immunity clauses in the federal statutes, including those in respect of which it was held in Armour & Company's case that a subpoena was not necessary to protection.

[216] Sec. 48, *supra*.

ing any self-incriminating evidence, even if such evidence be clearly within the scope of the subpœna and the coercive authority of the Commission, the witness should expressly claim his constitutional right to be silent and not incriminate himself, and should not give self-incriminating evidence until after his constitutional privilege of silence shall have been denied him. He should not trust to the immunity clause of the Trade Law to operate automatically, in the absence of an express claim of his constitutional privilege against self-incrimination, to protect him against subsequent prosecution based on the self-incriminating evidence given by him.[217]

§ 51. **Unreasonable searches and seizures:** Although corporations are not within the protection of the Fifth Amendment, the investigative power of the Commission as to corporations is perhaps limited to a degree by the prohibition in the Fourth Amendment against unreasonable searches and seizures. The restraint of the Fourth Amendment upon the Commission's subpœnaing, or examining and copying, the documentary evidence of a corporation, cannot however be regarded as very narrow.[218]

§ 52. **Methods of enforcing power:** The Trade Law provides four methods whereby the Trade Commission's investigative power may be enforced, should the exercise thereof be sought to be obstructed or resisted. They are substantially the same as the methods whereby the Interstate Commerce Commission may secure the enforcement of its investigative power. They are (1)

[217] *United States* v. *Skinner* (1914) 218 Fed. 870.

[218] *Hale* v. *Henkel* (1906) 201 U. S. 43, 76-83; *Wilson* v. *United States* (1911) 221 U. S. 361, 382-384; *Int. Com. Com.* v. *Goodrich Transit Co.* (1912) 224 U. S. 194, 215.

criminal proceedings (2) actions for penalties (3) contempt proceedings and (4) mandamus.

§ 53. Criminal proceedings: Certain acts in obstruction or resistance of the Trade Commission's investigative power, if done with the necessary intent, are declared by the Trade Law to be offenses against the United States.[219] Those acts are (1) willfully neglecting or refusing to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence in obedience to the subpœna or lawful requirement of the Commission; (2) making, or causing to be made, any false entry or statement of fact in any report required to be made under the Trade Law; (3) making any false entry in any account, record or memorandum kept by any corporation subject to the Trade Law; (4) neglecting or failing to make, or to cause to be made, full, true and correct entries in accounts, records or memoranda kept by any corporation subject to the Trade Law, of all facts and transactions appertaining to the business of such corporation; (5) removing out of the jurisdiction of the United States, or mutilating, altering, or by other means falsifying any documentary evidence of any corporation subject to the Trade Law; (6) refusing to submit to the Commission, or any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of any corporation subject to the Trade Law, if such evidence is within the possession or control of the person refusing.

A person convicted of any of those acts in a federal court of competent jurisdiction, may be fined not less than $1,000 nor more than $5,000, or imprisoned, or both. The maximum imprisonment possible is one year for

[219] Trade Law, Sec. 10. Cf. 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8592, (7) p. 3874, relating to Interstate Commerce Commission.

refusing to appear and testify or to produce documentary evidence in obedience to the subpœna of the Commission, and three years for each of the other offenses.

§ 54. **Actions for penalties:**[220] If a corporation shall fail to file any annual or special report within the time fixed therefor by the Commission, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure. The forfeiture may be recovered in a civil suit in the name of the United States brought by the district attorney in the district court of the United States in the district where the corporation has its principal office, or in any district in which it does business. The forfeiture, when recovered, is to be paid into the Treasury of the United States.

§ 55. **Contempt proceedings:**[221] In case of disobedience of a subpœna issued by the Commission, the Commission may invoke the aid of the district court of the United States in the district where the inquiry by the Commission is being conducted. The court may order the corporation or person guilty of such disobedience to appear before the Commission, or to produce documentary evidence, or to give testimony, and may punish any failure to comply with such order as a contempt of court.[222]

§ 56. **Mandamus:**[223] The Commission may request

[220]Trade Law, Sec. 10. Cf. 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8592, (2), p. 3873, relating to Interstate Commerce Commission.

[221]Trade Law, Sec. 9. Cf. 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8576, p. 3834, relating to Interstate Commerce Commission.

[222]*Int. Com. Com.* v. *Brimson* (1894) 154 U. S. 447 s. c. 155 U. S. 3.

[223]Trade Law, Sec. 9. Cf. 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8592, (9), p. 3875, relating to Interstate Commerce Commission.

the Attorney General to apply for, and upon such application the district courts of the United States may issue, writs of mandamus commanding any person to comply with the provisions of the Trade Law or any order of the Commission made in pursuance thereof.

The terms of the Trade Law relating to writs of mandamus are broad enough, considered in isolation, to authorize the issuance of such writs by district courts to compel obedience to orders to cease and desist made by the Commission under its regulative power. But the provision of the Trade Law[224] which confers exclusive jurisdiction upon the courts of appeals of the United States to enforce, set aside, or modify the Commission's orders to cease and desist, would seem to preclude the possibility of obtaining enforcement of such orders by writs of mandamus issued by the district courts.

It seems likely, therefore, that the use of writs of mandamus will be confined to obtaining enforcement of the Commission's investigative power. And a writ probably will be denied when the information sought by the Commission consists of confidential communications, such as letters between attorney and client, and perhaps in other instances.[225]

§ 57. **Improper disclosures:** If any Commissioner, or any employee of the Commission, shall, without the authority of the Commission, make public any information obtained by the Commission, unless directed so to do by a court, he shall be guilty of a misdemeanor, and may be punished by a fine of not more than $5,000, or by imprisonment not exceeding one year, or by both fine and imprisonment in the discretion of the court.[226]

[224]Trade Law, Sec. 5. Cf. note 117, *supra*.

[225]*United States* v. *Louis. & Nash. R. R.* (1914) 212 Fed. 486, 493-495, aff'd (1915) 236 U. S. 318.

[226]Trade Law, Sec. 10. Cf. 4 U. S. Comp. Stat. (1913) Tit. 56A, Ch. A, Sec. 8592, (8), p. 3874, relating to Interstate Commerce Commission.

APPENDIX.

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TRADE LAW.[a]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

[a]Entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes." (Public No. 203; 63d Congress; H. R. 15613). Approved September 26, 1914. Supp. U. S. Comp. Stat. (1913) Tit. 56CC; Secs. 8836a-8836k; 38 U. S. Stat. at L., Ch. 311, p. 717.

SEC. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of $5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

Sec. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending

investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

SEC. 4. That the words defined in this section shall have the following meaning when found in this Act, to-wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to car-

ry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this Act.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"Antitrust acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February twelfth, nineteen hundred and thirteen.

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has

been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the

same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by

the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person,

partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against

any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or

traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

SEC. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

SEC. 9 That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpœnas, and members and

examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of uch documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as

witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpœna of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpœna issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully

make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out

of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

CLAYTON LAW.[a]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or

[a]Entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes." (Public No. 212; 63d Congress; H. R. 15657). Approved October 15, 1914. Supp. U. S. Comp. Stat. (1913) Tit. 56C, Secs. 8835a-8835o; 38 U. S. Stat. at L., Ch. 323, p. 730.

other place under the jurisdiction of the United States: *Provided,* That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities,

whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further,* This section shall not apply to consent judgments or decrees rendered

in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly,

the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monoply of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to pre-

vent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than $5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of

this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided,* That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further,* That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further,* That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that

the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

SEC. 9. Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than $500 or confined in the penitentiary

not less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the district court of the United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where ap-

plicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it

shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported

by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over the other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board,

either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

SEC. 13. That in any suit, action, or proceeding brought by or on behalf of the United States subpœnas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: *Provided,* That in civil cases no writ of subpœna shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual

directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage

by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be

entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

SEC. 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the

same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or

withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided,*

however, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficent number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: *Provided,* That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open

court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year

from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

SEC. 26. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

SHERMAN LAW.[a]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or com-

[a]Entitled "An Act To protect trade and commerce against unlawful restraints and monopolies." Approved July 2, 1890. 4 U. S. Comp. Stat. (1913) Tit. 56 C, Secs. 8820-8823, 8827-8830, pp. 4010-4012, 4014-4015; 26 U. S. Stat. at L., Ch. 647, p. 209.

merce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

WILSON LAW.[a]

(AS AMENDED)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That * * * .

SEC. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any com-

[a]Entitled "An Act To reduce taxation, to provide revenue for the Government, and for other purposes." Received by the President August 15, 1894, and became a law without the President's approval, pursuant to Art. I, Sec. 7 of the Constitution, on August 27, 1894. 28 U. S. Stat. at L., Ch. 349, pp. 509, 570. Amended by an act entitled "An Act to amend section seventy-three and section seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes'." (Public No. 370; 62d Congress; H. R. 25002). Approved February 12, 1913. 37 U. S. Stat. at L., Ch. 40, p. 667. See 4 U. S. Comp. Stat. (1913) Tit. 56 C, Secs. 8831-8835, pp. 4015-4017.

modity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

SEC. 74. That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 75. That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this Act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy,

and being the subject thereof, mentioned in section seventy-three of this Act, imported into and being within the United States or being in the course of transportation from one State to another, or to or from a Territory or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 77. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

RULES OF PRACTICE BEFORE THE FEDERAL TRADE COMMISSION.[a]

I. SESSIONS.

The principal office of the Commission at Washington, D. C., is open each business day from 9 a. m. to 4.30 p. m. The Commission may meet and exercise all its powers at any other place, and may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

Sessions of the Commission for hearing contested proceedings will be held as ordered by the Commission.

Sessions of the Commission for the purpose of making orders and for the transaction of other business, unless otherwise ordered, will be held at the office of the Commission at Washington, D. C., on each business day at 10.30 a. m. Three members of the Commission shall constitute a quorum for the transaction of business.

All orders of the Commission shall be signed by the Secretary.

II. COMPLAINTS.

Any person, partnership, corporation, or association may apply to the Commission to institute a proceeding in respect to any violation of law over which the Commission has jurisdiction.

Such application shall be in writing, signed by or in behalf of the applicant, and shall contain a short and

[a]Adopted June 17, 1915. Amended October 29, 1915; see note "b" *infra.*

simple statement of the facts constituting the alleged violation of law and the name and address of the applicant and of the party complained of.

The Commission shall investigate the matters complained of in such application, and if upon investigation the Commission shall have reason to believe[b] that there is a violation of law over which the Commission has jurisdiction, the Commission shall issue and serve upon the party complained of a complaint stating its charges and containing a notice of a hearing upon a day and at a place therein fixed, at least 40 days after the service of said complaint.

III. ANSWERS.

Within 30 days from the service of the complaint, unless such time be extended by order of the Commission, the defendant shall file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. It shall specifically admit or deny or explain each of the facts alleged in the complaint, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Answers in typewriting must be on one side of the paper only, on paper not more than 8½ inches wide and not more than 11 inches long, and weighing not less than 16 pounds to

[b]The third paragraph of Rule No. II, as originally adopted, was amended October 29, 1915. As originally adopted the third paragraph of Rule No. II had the words "it shall appear to the Commission," following the word "investigation," where the words "the Commission shall have reason to believe" now appear. In substituting the words "the Commission shall have reason to believe" for the words originally used, the Commission adopted language found both in section five of the Trade Law and section eleven of the Clayton Law.

the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, or they may be printed in 10 or 12 point type on good unglazed paper 8 inches wide by 10½ inches long, with inside margins not less than 1 inch wide.

IV. SERVICE.

Complaints, orders, and other processes of the Commission may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer, or a director, of the corporation or association to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, corporation, or association; or (c) by registering and mailing a copy thereof addressed to such person, partnership, corporation, or association at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process, setting forth the manner of said service, shall be proof of the same, and the return post-office receipt for said complaint, order, or other process, registered and mailed as aforesaid, shall be proof of the service of the same.

V. INTERVENTION.

Any person, partnership, corporation, or association desiring to intervene in a contested proceeding shall make application in writing, setting out the grounds on which he or it claims to be interested. The Commission may, by order, permit intervention by counsel or in person to such extent and upon such terms as it shall deem just.

Applications to intervene must be on one side of the paper only, on paper not more than 8½ inches wide and not more than 11 inches long, and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide, or they may be printed in 10 or 12 point type on good unglazed paper 8 inches wide by 10½ inches long, with inside margins not less than 1 inch wide.

VI. CONTINUANCES AND EXTENSIONS OF TIME.

Continuances and extensions of time will be granted at the discretion of the Commission.

VII. WITNESSES AND SUBPOENAS.

Witnesses shall be examined orally, except that for good and exceptional cause for departing from the general rule the Commission may permit their testimony to be taken by deposition.

Subpœnas requiring the attendance of witnesses from any place in the United States at any designated place of hearing may be issued by any member of the Commission.

Subpœnas for the production of documentary evidence (unless directed to issue by a Commissioner upon his own motion) will issue only upon application in writing, which must be verified and must specify, as near as may be, the documents desired and the facts to be proved by them.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken, and the persons taking the same,

shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

VIII. DEPOSITIONS IN CONTESTED PROCEEDINGS.

The Commission may order testimony to be taken by deposition in a contested proceeding.

Depositions may be taken before any person designated by the Commission and having power to administer oaths.

Any party desiring to take the deposition of a witness shall make application in writing, setting out the reasons why such deposition should be taken, and stating the time when, the place where, and the name and post-office address of the person before whom it is desired the deposition be taken, the name and post-office address of the witness, and the subject matter or matters concerning which the witness is expected to testify. If good cause be shown, the Commission will make and serve upon the parties, or their attorneys, an order wherein the Commission shall name the witness whose deposition is to be taken and specify the time when, the place where, and the person before whom the witness is to testify, but such time and place, and the person before whom the deposition is to be taken, so specified in the Commission's order, may or may not be the same as those named in said application to the Commission.

The testimony of the witness shall be reduced to writing by the officer before whom the deposition is taken, or under his direction, after which the deposition shall be subscribed by the witness and certified in usual form by the officer. After the deposition has been so certified it shall, together with a copy thereof made by such officer or under his direction, be forwarded by such officer

under seal in an envelope addressed to the Commission at its office in Washington, D. C. Upon receipt of the deposition and copy the Commission shall file in the record in said proceeding such deposition and forward the copy to the defendant or the defendant's attorney.

Such depositions shall be typewritten on one side only of the paper, which shall be not more than 8½ inches wide and not more than 11 inches long and weighing not less than 16 pounds to the ream, folio base, 17 by 22 inches, with left-hand margin not less than 1½ inches wide.

No deposition shall be taken except after at least 6 days' notice to the parties, and where the deposition is taken in a foreign country such notice shall be at least 15 days.

No deposition shall be taken either before the proceeding is at issue, or, unless under special circumstances and for good cause shown, within 10 days prior to the date of the hearing thereof assigned by the Commission, and where the deposition is taken in a foreign country it shall not be taken after 30 days prior to such date of hearing.

IX. DOCUMENTARY EVIDENCE.

Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such document will not be filed, but a copy only of such relevant and material matter shall be filed.

X. BRIEFS.

Unless otherwise ordered, briefs may be filed at the close of the testimony in each contested proceeding. The presiding Commissioner or examiner shall fix the time

within which briefs shall be filed and service thereof shall be made upon the adverse parties.

All briefs must be filed with the Secretary and be accompanied by proof of service upon the adverse parties. Fifteen copies of each brief shall be furnished for the use of the Commission, unless otherwise ordered.

Application for extension of time in which to file any brief shall be by petition in writing, stating the facts upon which the application rests, which must be filed with the Commission at least 5 days before the time for filing the brief.

Every brief shall contain, in the order here stated—

(1) A concise abstract, or statement of the case.

(2) A brief of the argument, exhibiting a clear statement of the points of fact or law to be discussed, with the reference to the pages of the record and the authorities relied upon in support of each point.

Every brief of more than 10 pages shall contain on its top fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.

Briefs must be printed in 10 or 12 point type on good unglazed paper 8 inches by 10½ inches, with inside margins not less than 1 inch wide, and with double-leaded text and single-leaded citations.

Oral arguments will be had only as ordered by the Commission.

XI. ADDRESS OF THE COMMISSION.

All communications to the Commission must be addressed to Federal Trade Commission, Washington, D. C., unless otherwise specifically directed.

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